UNITED
NATIONS

A

General Assembly

Distr.
GENERAL

A/CN.4/480
27 February 1997
ENGLISH
ORIGINAL: ENGLISH/FRENCH

INTERNATIONAL LAW COMMISSION
Forty-ninth session
Geneva, 12 May-18 July 1997

THIRD REPORT ON NATIONALITY IN RELATION TO THE SUCCESSION OF STATES

by

Mr. Václav MIKULKA, Special Rapporteur

CONTENTS

		Paragraphs	Page
I.	INTRODUCTION	1 - 16	4
	A. Previous work on the topic	1 - 3	4
	B. General Assembly resolution 51/160 and the work to be accomplished on the topic during the forty-ninth session of the Commission	4 - 8	5
	C. Scheme and scope of application of the draft articles	9 - 16	6
II.	DRAFT ARTICLES ON NATIONALITY IN RELATION TO THE SUCCESSION OF STATES		9
	A. Text of the draft articles		9
	B. Text of the draft articles with commentaries		18
	Title and terminology		18
	Text of the footnote containing definitions		19
	Preamble		27

CONTENTS (continued)

Page

Part I. GENERAL PRINCIPLES CONCERNING NATIONALITY IN RELATION TO THE SUCCESSION OF STATES 35

Article 1. Right to a nationality 35

Article 2. Obligation of States concerned to take all reasonable measures to avoid statelessness 40

Article 3. Legislation concerning nationality and other connected issues 45

Article 4. Granting of nationality to persons having their habitual residence in another State 49

Article 5. Renunciation of the nationality of another State as a condition for granting nationality 52

Article 6. Loss of nationality upon the voluntary acquisition of the nationality of another State . 53

Article 7. The right of option 55

Article 8. Granting and withdrawal of nationality upon option 55

Article 9. Unity of families 72

Article 10. Right of residence 80

Article 11. Guarantees of the human rights of persons concerned 86

Article 12. Non-discrimination 88

Article 13. Prohibition of arbitrary decisions concerning nationality issues 92

Article 14. Procedures relating to nationality issues 94

Article 15. Obligation of States concerned to consult and and negotiate 95

Article 16. Other States 98

/...

CONTENTS (continued)

Page

Part II. PRINCIPLES APPLICABLE IN SPECIFIC SITUATIONS OF SUCCESSION OF STATES ....)

Section 1. Transfer of part of the territory ....)

Article 17. Granting of the nationality of the successor State and withdrawal of the nationality of the predecessor State ....)

Section 2. Unification of States ....)

Article 18. Granting of the nationality of the successor State ....)

Section 3. Dissolution of a State ....)

Article 19. Scope of application ....) see
)Add.1

Article 20. Granting of the nationality of the successor States ....)

Article 21. Granting of the right of option by the successor States ....)

Section 4. Separation of part of the territory ....)

Article 22. Scope of application ....)

Article 23. Granting of the nationality of the successor State ....)

Article 24. Withdrawal of the nationality of the predecessor State ....)

Article 25. Granting of the right of option by the predecessor and the successor States ....)

I. INTRODUCTION

A. Previous work on the topic

1. The consideration by the International Law Commission of the question of nationality in relation to the succession of States has a relatively short history.[1] Initially entitled "State succession and its impact on the nationality of natural and legal persons", the topic was included in the Commission's agenda at its forty-fifth session, in 1993. The General Assembly encouraged the Commission to undertake a preliminary study of this topic in paragraph 7 of its resolution 48/31 of 9 December 1993, paragraph 6 of its resolution 49/51 of 9 December 1994 and paragraph 4 of its resolution 50/45 of 11 December 1995.

2. The Special Rapporteur submitted his first and second reports[2] to the Commission, which considered them at its forty-seventh and forty-eighth sessions, respectively. A summary of this debate is contained in chapter III of the report of the Commission on the work of its forty-seventh session[3] and chapter IV of its report on the work of its forty-eighth session[4]. The Commission decided to establish a Working Group with the mandate to undertake a detailed substantive study of the issues raised in the Special Rapporteur's reports. The preliminary report of the Working Group is contained in the annex to the report of the Commission on the work of its forty-seventh session, and its final conclusions appear in paragraphs 78 to 87 of the report of the Commission on the work of its forty-eighth session.

3. Having thus completed the preliminary study of the topic, the Commission recommended to the General Assembly that it should request the Commission to undertake the substantive study of the topic of nationality in relation to the succession of States.[5]

---

[1] For a short outline of the Commission's previous work on two related topics - succession of States (in respect of treaties and in respect of State property, archives and debts) and nationality (or, rather, statelessness) - see the first report of the Special Rapporteur (A/CN.4/467, paras. 1-7 and 8-12 respectively).

[2] A/CN.4/467 and A/CN.4/474 and Corr.1.

[3] Official Records of the General Assembly, Fiftieth Session, Supplement No. 10 (A/50/10), paras. 165-193.

[4] Ibid., Fifty-first Session, Supplement No. 10 (A/51/10), paras. 67-88.

[5] Ibid., para. 88.

B. General Assembly resolution 51/160 and the work to be accomplished on the topic during the forty-ninth session of the Commission

4. In paragraph 8 of its resolution 51/160 of 16 December 1996, the General Assembly, having taken note of the Commission's completion of the preliminary study of the topic entitled "State succession and its impact on the nationality of natural and legal persons", "request[ed] the International Law Commission to undertake the substantive study of the topic entitled 'Nationality in relation to the succession of States' in accordance with the modalities provided for in paragraph 88 of its report ...". As to the aforesaid modalities, what was mainly involved was (a) separating the consideration of the question of the nationality of natural persons from that of the nationality of legal persons and giving priority to the former, (b) preparing draft articles with commentaries on the priority topic in the form of a declaration to be adopted by the General Assembly, and (c) completing the first reading of the draft articles at the forty-ninth, or, at the latest, the fiftieth session of the Commission.[6]

5. At the same time, the General Assembly invited Governments to submit comments on the practical problems raised by succession of States affecting the nationality of legal persons, that is to say, the problems raised in the second part of the topic, whose consideration the Commission proposed to defer to a later stage.[7]

6. In view of the explicit nature of the General Assembly's request to the Commission and, in particular, the firm schedule established for work on the topic, the Special Rapporteur prepared a set of draft articles on the whole topic of the nationality of natural persons.[8] This should enable the Commission, at the outset of its detailed study of the topic, to grasp the interaction between the proposed articles and to have a better understanding of

---

[6] Ibid., subparas. (a), (b) and (c).

[7] Ibid., subpara. (d), which reads as follows:

> "(d) the decision on how to proceed with respect to the question of the nationality of legal persons will be taken upon completion of the work on the nationality of natural persons and in light of the comments that the General Assembly may invite States to submit on the practical problems raised by a succession of States in this field."

[8] He left aside the problem of continuity of nationality in the context of State succession, in the light of the preference expressed by the Commission for examining this specific question under the topic of diplomatic protection. For a more detailed discussion of the decisions adopted in this regard, see the second report (A/CN.4/474, paras. 173-176).

the Special Rapporteur's intentions regarding the various provisions.[9] The draft articles are based on the conclusions of the Working Group.[10]

7. Taking into consideration the Commission's recent conclusions regarding its work methods in general, particularly the role of the Special Rapporteur and the need for a standing consultative group,[11] the Special Rapporteur on the topic under consideration benefited from the availability of former members of the Working Group, holding prior consultations with them on the question of the structure to be given to the draft articles and on the preliminary drafts of various articles. He wishes to express his deepest gratitude to them for their active contribution to this work.

8. Also taking into consideration the Commission's conclusions regarding the preparation of commentaries to draft articles[12], the Special Rapporteur is submitting the draft articles with commentaries, following the practice of previous special rapporteurs. The submission of the draft articles together with the commentaries should "help to explain the purpose of the draft articles and to clarify their scope and effect" and should make possible "[s]imultaneous work on text and commentary [in order to] enhance the acceptability of both".[13] In principle, these commentaries contain a discussion of State practice with respect to the doctrinal issues under consideration and elements of the debates which took place within the Commission and the Sixth Committee.

C. Scheme and scope of application of the draft articles

9. The draft articles are divided into two parts: Part I deals with the general principles of nationality in relation to the succession of States and Part II with the principles governing specific cases of State succession. While

---

[9] This practice, moreover, is not an innovation. It may be recalled that in 1952, Mr. Manley O. Hudson, Special Rapporteur for the topic of nationality, had submitted to the Commission an entire draft convention on the nationality of married persons. Similarly, in 1953, his successor in the post of Special Rapporteur, Mr. Roberto Córdoba, also submitted a complete set of draft articles on the topic of statelessness, which enabled the Commission to adopt two preliminary draft conventions at the same session, one on the elimination of statelessness in the future and the other on the reduction of future statelessness. See United Nations, The Work of the International Law Commission, fourth edition, Sales No. E.88.V.1, pp. 36-39.

[10] Official Records of the General Assembly, Fiftieth Session, Supplement No. 10 (A/50/10), paras. 165-193, annex (preliminary report of the Working Group); Official Records of the General Assembly, Fifty-first Session, Supplement No. 10 (A/51/10), paras. 78-88.

[11] Ibid., Fifty-first Session, Supplement No. 10 (A/51/10), paras. 192-196.

[12] Ibid., paras. 197-200.

[13] Ibid., para. 198.

the principles in Part I apply to all cases of State succession without distinction, the principles in Part II are formulated in accordance with the various types of State succession.

10. Another difference between the two parts consists of the way in which the principles apply to the States concerned. While the principles in Part I cannot all be regarded as forming part of positive law (lex lata), the States concerned should be invited simply to observe them. On the other hand, the principles in Part II are intended mainly to facilitate negotiations between the States concerned or to encourage their lawmaking efforts. They offer the States concerned certain "technical" solutions to the problems which arise. The States concerned can base their agreement on the solutions thus proposed. At the same time they can, in the course of their negotiations, find solutions that are more appropriate and better adapted to the needs of the specific situation, and, by agreement, base their respective laws on them. If such solutions are in conformity with the principles in Part I, it will be difficult to object to them.

11. The types of the succession of States envisaged in Part II are as follows: (a) transfer of part of the territory; (b) unification of States; (c) dissolution of a State; and (d) separation of part of the territory. This categorization gives effect to the decision of the Commission to follow, in this respect, the approach in the 1983 Vienna Convention on Succession of States in respect of State Property, Archives and Debts rather than that in the 1978 Vienna Convention on Succession of States in respect of Treaties[14] and, in view of the current requirements of the international community and the completion of the decolonization process, to leave aside the category of newly independent States that emerged from decolonization.[15]

12. As in the case of the Commission's previous work on the topic of State succession, the current draft articles relate only to cases of "succession of States occurring in conformity with international law and, in particular, the

---

[14] In the context of its work on the topic of succession of States in respect of treaties, the Commission "concluded that for the purpose of codifying the modern law of succession of States in respect of treaties it would be sufficient to arrange the cases of succession of States under three broad categories: (a) succession in respect of part of territory; (b) newly independent States; (c) uniting and separation of States". These categories were maintained by the diplomatic conference and are incorporated in the 1978 Vienna Convention on Succession of States in respect of Treaties.

[15] It decided, however, to consider issues of nationality which arose during the process of decolonization, insofar as their consideration sheds light on nationality issues common to all types of territorial changes.

principles of international law embodied in the Charter of the United Nations".[16] Accordingly, the current draft articles do not apply to questions of nationality which might arise, for example, in cases of annexation of the territory of a State by force.

13. In order to establish the precise framework of problems to which the present draft articles relate, it is necessary to underline that they encompass, *ratione materiae*, the issue of the loss and acquisition of nationality as well as the issue of the right of option between the nationality of the States concerned by the succession of States. Special emphasis is placed upon prevention of the statelessness which can arise from State succession. In respect of dual nationality, the draft articles preserve the freedom of the States concerned to follow any policy they wish.

14. Thus, the problems on which the draft articles focus are part of the branch of international law dealing with nationality. By their nature, they are very similar to those which the Commission had already considered under the topic "Nationality, including statelessness". However, the former differ from the latter in two respects. On the one hand, the Commission's scope is now broader than before: it is not limited to the problem of statelessness, although this is of paramount importance, but covers all the issues arising from changes of nationality. On the other hand, its consideration is limited to the change of nationality which results from a succession of States or is closely related thereto. This defines the scope of application of the draft articles *ratione temporis*.

15. Finally, the draft articles apply, *ratione personae*, to all individuals who could potentially lose the nationality of the predecessor State or, respectively, those susceptible of being granted the nationality of the successor State as a result of a succession of States.

16. Most of these questions will be clarified in a more detailed manner in the commentaries to the provisions in relation to which they are of particular relevance.

---

[16] See article 6 of the Vienna Convention on Succession of States in respect of Treaties and article 3 of the Vienna Convention on Succession of States in respect of State Property, Archives and Debts. As stated in the commentary to article 6 of the draft articles on succession of States in respect of treaties, the Commission "in preparing draft articles for the codification of the rules of general international law normally assumes that those [draft] articles are to apply to facts occurring and situations established in conformity with international law ... Only when matters not in conformity with international law call for specific treatment or mention does it deal with facts or situations not in conformity with international law". *Yearbook ... 1972*, vol. II, p. 236, document A/8710/Rev.1.

II. DRAFT ARTICLES ON NATIONALITY IN RELATION TO THE SUCCESSION OF STATES

A. Text of the draft articles

Draft articles on nationality in relation to the succession of States*

Considering that, in connection with recent cases of succession of States, problems concerning nationality have again become a matter of concern to the international community,

Emphasizing that, while nationality is essentially governed by internal law, international law imposes certain restrictions on the freedom of action of States in this field,

Convinced of the need for the codification and progressive development of the rules of international law concerning nationality in relation to the succession of States as a means for ensuring greater juridical security in international relations and strengthening respect for human rights,

---

* For the purposes of the present draft articles:

(a) "succession of States" means the replacement of one State by another in the responsibility for the international relations of territory;

(b) "predecessor State" means the State which has been replaced by another State on the occurrence of a succession of States;

(c) "successor State" means the State which has replaced another State on the occurrence of a succession of States;

(d) "date of the succession of States" means the date upon which the successor State replaced the predecessor State in the responsibility for the international relations of the territory to which the succession of States relates;

(e) "third State" means any State other than the predecessor State or the successor State;

(f) "nationality" means nationality of natural persons;

(g) "State concerned" means the predecessor State(s) or the successor State(s), as the case may be;

(h) "person concerned" means every individual who, on the date of the succession of States, had the nationality of the predecessor State, or was entitled to acquire such nationality in accordance with the provisions of the internal law of the predecessor State, and whose nationality or the right thereto may be affected by the succession of States.

/...

Recalling that the Universal Declaration of Human Rights proclaimed the right of every person to a nationality,

(...)

PART I

GENERAL PRINCIPLES CONCERNING NATIONALITY IN RELATION TO THE SUCCESSION OF STATES

Article 1

Right to a nationality

1. Every individual who, on the date of the succession of States, had the nationality of the predecessor State, irrespective of the mode of acquisition of that nationality, or was entitled to acquire such nationality in accordance with the provisions of the internal law of the predecessor State, has the right to the nationality of at least one of the States concerned.

2. If a child born after the date of the succession of States whose parent is a person mentioned in paragraph 1 of this article has not acquired the nationality of at least one of the States concerned, or that of a third State, such child has the right to acquire the nationality of the State concerned on whose territory or otherwise under whose jurisdiction (hereafter "on the territory") he or she was born.

Article 2

Obligation of States concerned to take all reasonable measures to avoid statelessness

The States concerned are under the obligation to take all reasonable measures to avoid persons who, on the date of the succession of States, had the nationality of the predecessor State becoming stateless as a result of the said succession of States.

Article 3

Legislation concerning nationality and other connected issues

1. Each State concerned should enact laws concerning nationality and other connected issues arising in relation to the succession of States without undue delay. It should take all necessary measures to ensure that persons concerned will be apprised, within a reasonable time period, of the impact of its legislation on their nationality, of any

/...

choices they may have thereunder, as well as of the consequences that the exercise of such choices will have on their status.

2. When providing for the ex lege acquisition of nationality in relation to the succession of States, the legislation of the States concerned should provide that such acquisition of nationality takes effect on the date of the succession of States. The same would apply for the acquisition of nationality following the exercise of an option, if the persons concerned would otherwise be stateless during the period between the date of the succession of States and the date of the exercise of such option.

Article 4

Granting of nationality to persons having their habitual residence in another State

1. A successor State does not have the obligation to grant its nationality to persons concerned if they have their habitual residence in another State and also have the nationality of that State.

2. A successor State shall not impose its nationality on persons who have their habitual residence in another State against the will of such persons, unless they would otherwise become stateless.

Article 5

Renunciation of the nationality of another State as a condition for granting nationality

When the person concerned entitled to acquire the nationality of a successor State has the nationality of another State concerned, the former State may make the acquisition of its nationality dependent on the renunciation by such person of the nationality of the latter State. However, such requirement shall not be applied in a manner which would result in rendering the person concerned stateless, even if only temporarily.

Article 6

Loss of nationality upon the voluntary acquisition of the nationality of another State

1. The predecessor State may provide in its legislation that persons who, in relation to the succession of States, voluntarily acquire the nationality of a successor State shall lose its nationality.

2. Each successor State may provide in its legislation that persons who, in relation to the succession of States, voluntarily acquire the

/...

nationality of another successor State or, as the case may be, retain the nationality of the predecessor State shall lose its nationality acquired in relation to such succession of States or the entitlement thereto.

Article 7

The right of option

1. Without prejudice to their policy in the matter of multiple nationality, the States concerned should give consideration to the will of a person concerned whenever that person is equally qualified, either in whole or in part, to acquire the nationality of two or several States concerned.

2. Any treaty between States concerned or, as the case may be, the legislation of a State concerned should provide for the right of option for the nationality of that State by any person concerned who has a genuine link with that State if the person would otherwise become stateless as a consequence of the succession of States.

3. There should be a reasonable time limit for the exercise of any right of option.

Article 8

Granting and withdrawal of nationality upon option

1. When persons entitled to the right of option have exercised such right, the State whose nationality such persons have opted for shall grant them its nationality.

2. When persons entitled to the right of option in accordance with these draft articles have exercised such right, the State whose nationality such persons have renounced shall withdraw its nationality from them, unless they would thereby become stateless.

3. Without prejudice to any obligation deriving from a treaty in force between States concerned, the State concerned other than the State whose nationality the persons concerned have opted for does not have the obligation to withdraw its nationality from them on the basis of the mere fact that they have opted for the nationality of the latter State, unless those persons have clearly expressed their will to renounce its nationality. This State may, nevertheless, withdraw its nationality from such persons when their acquiescence to the loss of its nationality may be presumed in the light of legislation in force on the date of the option.

/...

Article 9

Unity of families

Where the application of their internal law or of treaty provisions concerning the acquisition or loss of nationality in relation to the succession of States would impair the unity of a family, the States concerned shall adopt all reasonable measures to allow that family to remain together or to be reunited.

Article 10

Right of residence

1. Each State concerned shall take all necessary measures to ensure that the right of residence in its territory of persons concerned who, because of events connected with the succession of States, were forced to leave their habitual residence on the territory of such State, is not affected as a result of such absence. That State shall take all necessary measures to allow such persons to return to their habitual residence.

2. Without prejudice to the provisions of paragraph 3, the successor State shall preserve the right of residence in its territory of all persons concerned who, prior to the date of the succession of States, were habitually resident in the territory which became the territory of the successor State and who have not acquired its nationality.

3. Where the law of a State concerned attaches to the voluntary loss of its nationality or to the renunciation of the entitlement to acquire its nationality by persons acquiring or retaining the nationality of another State concerned the obligation that such persons transfer their residence out of its territory, a reasonable time limit for compliance with that obligation shall be granted.

Article 11

Guarantees of the human rights of persons concerned

Each State concerned shall take all necessary measures to ensure that the human rights and fundamental freedoms of persons concerned who, after the date of the succession of States, have their habitual residence in its territory are not adversely affected as a result of the succession of States irrespective of whether they have the nationality of that State.

Article 12

Non-discrimination

When withdrawing or granting their nationality, or when providing for the right of option, the States concerned shall not apply criteria based on ethnic, linguistic, religious or cultural considerations if, by so doing, they would deny the persons concerned the right to retain or acquire a nationality or would deny those persons their right of option, to which such persons would otherwise be entitled.

Article 13

Prohibition of arbitrary decisions concerning nationality issues

1. No persons shall be arbitrarily deprived of the nationality of the predecessor State or denied the right to acquire the nationality of the successor State, which they were entitled to retain or acquire in relation to the succession of States in accordance with the provisions of any law or treaty applicable to them.

2. Persons concerned shall not be arbitrarily deprived of their right of option to which they might be entitled in accordance with such provisions.

Article 14

Procedures relating to nationality issues

Each State concerned shall ensure that applications relating to the acquisition, retention or renunciation of nationality or to the exercise of the right of option in relation to the succession of States are processed without undue delay and that relevant decisions, including those concerning the refusal to issue a certificate of nationality, shall be issued in writing and shall be open to administrative or judicial review.

Article 15

Obligation of States concerned to consult and negotiate

1. The States concerned are under the obligation to consult in order to identify any detrimental effects that may result from the succession of States with respect to the nationality of individuals and other related issues concerning their status and, as the case may be, to seek a solution of those problems through negotiations.

2. If one of the States concerned refuses to negotiate, or negotiations between the States concerned are abortive, the State concerned the internal law of which is consistent with the present draft articles is deemed to have fully complied with its international obligations relating to nationality in the event of a succession of States, subject to any treaty providing otherwise.

Article 16

Other States

1. Without prejudice to any treaty obligation, where persons having no genuine link with a State concerned have been granted that State's nationality following the succession of States, other States do not have the obligation to treat those persons as if they were nationals of the said State, unless this would result in treating those persons as if they were de facto stateless.

2. Where persons who would otherwise be entitled to acquire or to retain the nationality of a State concerned become stateless as a result of the succession of States owing to the disregard by that State of the present draft articles, other States are not precluded from treating such persons as if they were nationals of the said State if such treatment is in the interest of those persons.

PART II

PRINCIPLES APPLICABLE IN SPECIFIC SITUATIONS OF SUCCESSION OF STATES

SECTION 1

TRANSFER OF PART OF THE TERRITORY

Article 17

Granting of the nationality of the successor State and withdrawal of the nationality of the predecessor State

When part of the territory of a State is transferred by that State to another State, the successor State shall grant its nationality to the persons concerned who have their habitual residence in the transferred territory and the predecessor State shall withdraw its nationality from such persons, unless otherwise indicated by the exercise of the right of option which all such persons shall be granted.

SECTION 2

UNIFICATION OF STATES

Article 18

Granting of the nationality of the successor State

Without prejudice to the provisions of article 4, when two or more States unite and so form one successor State, irrespective of whether the successor State is a new State or whether its personality is identical to that of one of the States which have merged, the successor State shall grant its nationality to all persons who, on the date of the succession of States, had the nationality of at least one of the predecessor States.

SECTION 3

DISSOLUTION OF A STATE

Article 19

Scope of application

The articles of this section apply when a State dissolves and ceases to exist and the various parts of the territory of the predecessor State form two or more successor States.

Article 20

Granting of the nationality of the successor States

Subject to the provisions of article 21, each of the successor States shall grant its nationality to the following categories of persons concerned:

(a) Persons having their habitual residence in its territory; and

(b) Without prejudice to the provisions of article 4:

(i) persons having their habitual residence in a third State, who were born in or, before leaving the predecessor State, had their last permanent residence in what has become the territory of that particular successor State; or

(ii) where the predecessor State was a State in which the category of secondary nationality of constituent entities existed, persons not covered by paragraph (a) who had the secondary nationality of an entity that has become part of that successor State, irrespective of the place of their habitual residence.

Article 21

Granting of the right of option by the successor States

1. The successor States shall grant a right of option to all persons concerned covered by the provisions of article 20 who would be entitled to acquire the nationality of two or more successor States.

2. Each successor State shall grant a right of option to persons concerned who have their habitual residence in a third State and who are not covered by the provisions of article 20, paragraph (b), irrespective of the mode of acquisition of the nationality of the predecessor State.

SECTION 4

SEPARATION OF PART OF THE TERRITORY

Article 22

Scope of application

The articles of this section apply when part or parts of the territory of a State separate from that State and form one or more successor States while the predecessor State continues to exist.

Article 23

Granting of the nationality of the successor State

Subject to the provisions of article 25, the successor State shall grant its nationality to the following categories of persons concerned:

(a) persons having their habitual residence in its territory; and

(b) without prejudice to the provisions of article 4, where the predecessor State is a State in which the category of secondary nationality of constituent entities existed, persons not covered by paragraph (a) who had the secondary nationality of an entity that has become part of that successor State, irrespective of the place of their habitual residence.

Article 24

Withdrawal of the nationality of the predecessor State

1. Subject to the provisions of article 25, the predecessor State shall not withdraw its nationality from:

(a) persons having their habitual residence either in its territory or in a third State; and

(b) where the predecessor State is a State in which the category of secondary nationality of constituent entities existed, persons not covered by paragraph (a) who had the secondary nationality of an entity that remained part of the predecessor State, irrespective of the place of their habitual residence.

2. The predecessor State shall withdraw its nationality from the categories of persons entitled to acquire the nationality of the successor State in accordance with article 23. It shall not, however, withdraw its nationality before such persons acquire the nationality of the successor State, unless they have the nationality of a third State.

Article 25

Granting of the right of option by the predecessor and the successor States

The predecessor and successor States shall grant a right of option to all persons concerned covered by the provisions of articles 23 and 24, paragraph 1, who would be entitled to have the nationality of both the predecessor and successor States or of two or more successor States.

B. Text of the draft articles with commentaries

Title and terminology

Commentary

(1) The title "Draft articles on nationality in relation to the succession of States" is proposed in conformity with the mandate which the General Assembly entrusted to the Commission under the terms of resolution 51/160, in which the Assembly invited the Commission to undertake a substantive study of the topic entitled "Nationality in relation to the succession of States".

(2) Concerning the terminology, the Special Rapporteur had suggested in his first report that, in order to ensure uniformity of terminology, the Commission should continue to use the definitions formulated previously in the context of the two Conventions on succession of States, contained in article 2

of the two Vienna Conventions. In addition, some other terms used in the present draft articles need to be defined.

(3) The Special Rapporteur does not have a definite opinion on the question whether the draft articles should include a separate article containing the definitions of the terms used, in view of the fact that the outcome of the work is to be a document of a declaratory nature.[17] As opposed to conventions which, as a rule, contain a specific article on definitions, declarations rarely do so.[18] Nevertheless, for the Commission's convenience, the Special Rapporteur is submitting draft definitions in the form of a footnote to the title so as to avoid any misunderstanding regarding the meaning of the terms used. It is for the Commission to decide whether and in which way to include these provisions in the draft articles.

Text of the footnote containing definitions

For the purposes of the present draft articles:

(a) "succession of States" means the replacement of one State by another in the responsibility for the international relations of territory;

(b) "predecessor State" means the State which has been replaced by another State on the occurrence of a succession of States;

(c) "successor State" means the State which has replaced another State on the occurrence of a succession of States;

(d) "date of the succession of States" means the date upon which the successor State replaced the predecessor State in the responsibility for the international relations of the territory to which the succession of States relates;

(e) "third State" means any State other than the predecessor State or the successor State;

(f) "nationality" means nationality of natural persons;

(g) "State concerned" means the predecessor State(s) or the successor State(s), as the case may be;

---

[17] Without prejudice to the final decision on this issue (see Official Records of the General Assembly, Fifty-first Session, Supplement No. 10 (A/51/10), para. 88 (b), and General Assembly resolution 51/160, para. 8).

[18] An exception is found in paragraph 2 of the Declaration on Fact-finding by the United Nations in the Field of the Maintenance of International Peace and Security, General Assembly resolution 46/59 of 9 December 1991, annex.

(h) "person concerned" means every individual who, on the date of the succession of States, had the nationality of the predecessor State, or was entitled to acquire such nationality in accordance with the provisions of the internal law of the predecessor State, and whose nationality or the right thereto may be affected by the succession of States.

Commentary

(1) The definitions in subparagraphs (a) to (e) are identical to those contained in article 2 of the Vienna Conventions of 1978 and 1983. This conforms to the Commission's view that there should be consistency in the use of terminology between its earlier and its present work.[19]

(2) The definitions contained in subparagraphs (f) to (h) have been prepared by the Special Rapporteur.

(3) In his endeavour to define the term "nationality", the Special Rapporteur was confronted with the substantive problem identified by the

---

[19] As the Commission explained in its commentary to those provisions, the term "succession of States" is used "as referring exclusively to the fact of the replacement of one State by another in the responsibility for the international relations of territory, leaving aside any connotation of inheritance of rights or obligations on the occurrence of that event". At that time, the Commission considered that the expression "in the responsibility for the international relations of territory" was preferable to other expressions such as "in the sovereignty in respect of territory", because it was a formula commonly used in State practice and more appropriate to cover in a neutral manner any specific case independently of the particular status of the territory in question. The Commission stated that the word "responsibility" should be read in conjunction with the words "for the international relations of territory" and was not intended to convey any notion of "State responsibility", a topic under study by the Commission at that time.

The meanings attributed to the terms "predecessor State", "successor State" and "date of the succession of States" were merely consequential upon the meaning given to "succession of States" and did not appear to the Commission to require any comment. In view of the Commission's decision to leave aside questions of nationality arising in relation to decolonization (see para. 11 above), the definitions above do not include the term "newly independent State". But whenever this term is used in the present report, it has the meaning given to it by the two Vienna Conventions. That is, it means "a State which has arisen from a succession of States in a territory which immediately before the date of the succession of States was a dependent territory for the international relations of which the predecessor State was responsible," no distinction being drawn among the various cases of emergence to independence. Accordingly, this term excludes cases concerning the birth of a new State as a result of separation of part of an existing State or of unification of two or more existing States. *Yearbook ... 1972*, vol. II, p. 231, document A/8710/Rev.1.

Commission during its examination of the concept of nationality, which he discussed in his first report,[20] namely that the term "nationality" may be defined in widely different ways depending on whether the problem is approached from the perspective of internal or international law, because the function of nationality is, in each case, different.[21]

(4) The various components of the concept of nationality have been identified by the International Court of Justice, which stated that nationality is:

> "a legal bond having as its basis a social fact of attachment, a genuine connection of existence, interests and sentiments, together with the existence of reciprocal rights and duties [and constituting] the juridical expression of the fact that the individual upon whom it is conferred, either directly by the law or as the result of an act of the authorities, is in fact more closely connected with the population of the State conferring nationality than with that of any other State".[22]

(5) The 1929 Draft Convention on Nationality prepared by Harvard Law School's Research on International Law defines nationality as "the status of a natural person who is attached to a State by the tie of allegiance".[23] In their introductory comment to the Convention, its drafters admitted that "[n]ationality has no positive, immutable meaning. On the contrary its meaning and import have changed with the changing character of States [...] Nationality always connotes, however, membership of some kind in the society of a State or nation."[24] The numerous definitions offered in writings,[25] while intellectually

---

[20] A/CN.4/467, paras. 37-45.

[21] In any event, "'[n]ationality', in the sense of citizenship of a certain State, must not be confused with 'nationality' as meaning membership of a certain nation in the sense of race." Sir Robert Jennings and Sir Arthur Watts, eds., Oppenheim's International Law, 9th ed., vol. I (London, Longman, 1992), p. 857.

[22] Nottebohm case, I.C.J. Reports, 1955, p. 23. As Jennings and Watts point out, the last part of this passage does not entirely reflect the situation which exists in cases of dual nationality. See Oppenheim's International Law, op. cit., p. 854, note 13.

[23] American journal of international law, vol. 23 (Special Suppl.) (1929), p. 13.

[24] Ibid., p. 21.

[25] Thus, e.g., according to Sir Robert Jennings and Sir Arthur Watts, "the [n]ationality of an individual is his quality of being a subject of a certain state" (Oppenheim's International Law, op. cit., p. 851). Henri Batiffol and Paul Lagarde define nationality as a "juridical attachment of a person to the population forming a constitutive element of a State. This attachment subjects the national to the so-called personal competence of that State, which is

stimulating, may be of limited significance for the purpose of the present draft articles.

(6) Aside from the different meaning given to the concept of nationality at the international and national levels, a State's internal laws may distinguish between various categories of legal status of individuals as evidenced by the difference in terminology between "nationals", "citizens" or "*ressortissants*". In some Latin American countries, for example, the expression "citizenship" has been used to denote the sum total of political rights of which a person may be deprived, by way of punishment or otherwise, and thus lose "citizenship" without being divested of nationality as understood in international law. In this respect one cannot but agree with the view that, "[s]ince nationality defines the population constituting the internal order vis-à-vis the external order, the possible modalities concerning the participation of nationals in internal legal affairs, in particular as regards political rights, is of little importance.[26]

(7) In some legal systems, the distinction between different categories of "nationals" relates to the different degree of integration of individual territories into a composite State. Thus, e.g., in the United States of America, the term "citizen" is, as a rule, employed to designate persons endowed with full political and personal rights within the United States, while some persons, such as those belonging to Territories and possessions which are not among the States forming the Union, are described as "nationals".[27] In the Commonwealth, the category of citizens of the individual States of the Commonwealth is different from that of "British subjects" or "Commonwealth citizens".[28] The use of categories such as "nationals" and "*ressortissants*" and

---

enforceable against other States" (Henri Batiffol and Paul Lagarde, *Droit international privé*, 7th ed., vol. I (Paris, Librairie générale de droit et de jurisprudence, 1981), p. 60). For D. P. O'Connell, "the expression 'nationality' in international law is only shorthand for the ascription of individuals to specific States for the purpose either of jurisdiction or of diplomatic protection. In the sense that a person falls within the plenary jurisdiction of a State, and may be represented by it, such a person is said to be a national of that State" (D. P. O'Connell, *State Succession in Municipal Law and International Law*, vol. I (Cambridge, United Kingdom, Cambridge University Press, 1967), p. 498). According to yet another author, "nationality is to be defined as an *aggregate status*, composed of the respective consequences attached to it by international and domestic law" (Siegfried Wiessner, "Blessed be the ties that bind: the nexus between nationality and territory", *Mississippi law journal*, vol. 56 (1986), p. 451.

[26] Batiffol and Lagarde, op. cit., pp. 65-66.

[27] See the first report, document A/CN.4/467, para. 39.

[28] While the citizenship of the individual States of the Commonwealth is primarily of importance for international law, the quality of a "British subject" or "Commonwealth citizen" is primarily relevant only as a matter of the internal law of the countries concerned.

/...

their meaning in different stages of the development of the French constitutional system was outlined in the first report.[29]

(8) A phenomenon specific to the federal States of Eastern Europe, i.e., the Soviet Union, Yugoslavia and Czechoslovakia, was the existence of parallel categories of nationality within a State.[30] On the other hand, as Rezek has observed, "in the United States, as well as in Argentina, Brazil, Mexico and Venezuela, nationality has a strictly federal meaning. The Latin American federal States are blind to the very concept of provincial citizenship, and while the latter exists in the United States, it is by no means obligatory".[31]

(9) A recent noteworthy development is the establishment by the Maastricht Treaty on European Union of a "citizenship of the Union". Under the terms of article 8, "[e]very person holding the nationality of a member State shall be a citizen of the Union".[32] However, the question whether an individual possesses the nationality of a member State is to be settled solely by reference to the national law of that State.[33]

(10) Finally, the term "national" may still have a special meaning for the purposes of any particular treaty.[34]

---

[29] A/CN.4/467, para. 40.

[30] Thus, for example, at the time of the creation of the Czechoslovak Federation, in 1969, the Czech and Slovak nationalities were introduced in parallel to Czechoslovak (federal) nationality, which originally had been the only nationality. See Law No. 165/1968 establishing a formal distinction between (federal) Czechoslovak nationality and that of each of the two republics forming the Federation, which opened the way for the adoption by the two republics of their own laws on nationality: Law No. 206/68 of the Slovak National Council and Law No. 39/69 of the Czech National Council. (The Czech Law and the Slovak Law on nationality were amended by Laws Nos. 92/1990 and 88/1990 of the Czech National Council and the Slovak National Council respectively.)

[31] José Francisco Rezek, "Le droit international de la nationalité", Recueil des cours ... 1986-III, vol. 198, p. 343.

[32] International Legal Materials, vol. XXXI (1992), p. 259.

[33] Ibid., p. 365.

[34] Thus, e.g., the Treaty of St. Germain and other peace treaties of 1919 use the term "ressortissant" as a notion wider than that of "national". (See National Bank of Egypt v. Austro-Hungarian Bank, Annual Digest of Public International Law Cases, vol. 2 (1923-24), No. 10, p. 25.) Many agreements for the settlement of claims contain special definitions to identify the nationals whose claims are being settled. (See, e.g., article VII of the Agreement between the Islamic Republic of Iran and the United States of America concerning the settlement of claims, International Legal Materials, vol. XX (1981), p. 232.)

/...

(11) In the light of the above, it would not be easy to provide a satisfactory "substantive" definition of "nationality". But in any case it is not evident that such a definition is necessary for the purpose of the present exercise. Even conventions regulating questions of nationality or statelessness do not always define the term "nationality".

(12) On the other hand, it is useful to make it clear, by means of a definition, that the problems concerning nationality addressed in the present draft articles are those relating to natural persons and not to legal (juridical) persons. Such clarification is necessary also owing to the fact that the problem of State succession and its impact on nationality was originally included in the Commission's agenda with the aim of covering both natural and legal persons[35] and only recently was the Commission instructed by the General Assembly to focus first on the nationality of natural persons.[36] This is achieved by the definition contained in subparagraph (f).

(13) Subparagraph (g) provides the definition of the term "State concerned", by which, depending on the type of the territorial change, are meant the States involved in a particular case of "succession of States". These are the predecessor State and the successor State in the case of a transfer of part of the territory (draft article 17), the successor State alone in the case of a unification of States (draft article 18), two or more successor States in the case of a dissolution of States (draft article 19) and the predecessor State and one or more successor States in the case of a separation of part of the territory (draft article 22). The term "State concerned" has nothing to do with the "concern" that any other State might have about the outcome of a succession of States in which its own territory is not involved.

(14) Subparagraph (h) provides the definition of the term "person concerned". This term encompasses all individuals who, on the date of the succession of States, had the nationality of the predecessor State and whose nationality may, accordingly, be affected by that particular succession of States. But which are the categories of persons whose nationality is presumed to be affected as a consequence of State succession? According to a widespread opinion, "it is not at all certain which categories of persons are susceptible of having their nationality affected by change of sovereignty".[37] In the Special Rapporteur's view, this uncertainty is largely attributable to the fact that many authors try to answer this question _in abstracto_, as if there existed a unique and simple response which would apply to all categories of territorial changes.

(15) By "persons susceptible of having their nationality affected" one must understand all individuals who could potentially lose the nationality of the

---

[35] See para. 7 of General Assembly resolution 48/31 of 9 December 1993.

[36] Paragraph 8 of General Assembly resolution 51/160 of 16 December 1996.

[37] D. P. O'Connell, _The Law of State Succession_ (Cambridge, United Kingdom, Cambridge University Press, 1956), p. 245.

predecessor State or, respectively, be granted the nationality of the successor State.[38]

(16) Determining the category of individuals affected by the loss of the nationality of the predecessor State is easy in the event of total State succession, when the predecessor State or States disappear as a result of the change of sovereignty: all individuals possessing the nationality of the predecessor State lose this nationality as an automatic consequence of that State's disappearance. But determining the category of individuals susceptible of losing the predecessor State's nationality is quite complex in the case of partial State succession, when the predecessor State survives the change. In the latter case, it is possible to distinguish among at least two main groups of individuals possessing the nationality of the predecessor State: persons residing in the territory affected by the change of sovereignty on the date of State succession (a category which comprises those born therein and those born elsewhere but having acquired the predecessor's nationality at birth or by naturalization) and those born in the territory affected by the change but not residing therein on the date of the change. Within the last category, a distinction must be made between those individuals residing in the territory which remains part of the predecessor State and those individuals residing in a third State.

(17) The delimitation of the categories of persons susceptible of acquiring the nationality of the successor State is not less difficult. In the event of total State succession, such as the absorption of one State by another State or the unification of States, when the predecessor State or States respectively cease to exist, all nationals of the predecessor State or States are candidates for the acquisition of the nationality of the successor State.

(18) In the case of the dissolution of a State, to which the above considerations equally apply, the situation becomes more complicated owing to the fact that two or more successor States appear and the range of individuals susceptible of acquiring the nationality of each particular successor State has to be defined separately. It is obvious that there will be overlaps between the categories of individuals susceptible of acquiring the nationality of the different successor States. Similar difficulties will arise with the delimitation of the categories of individuals susceptible of acquiring the nationality of the successor State in the event of secession or transfer of a part or parts of territory.

(19) The inhabitants of the territory affected by the succession of States may include, in addition to the nationals of the predecessor State, nationals of third States and stateless persons residing in that territory at the date of succession. It is generally recognized, that:

---

[38] According to a widely accepted view, the change of sovereignty affects only nationals of the predecessor State, while the nationality of other persons residing in the territory at the time of the transfer is not affected. See, e.g., Rene Masson v. Mexico, in John Basset Moore, International Arbitrations to which the United States has been a Party, vol. 3, pp. 2542-2543.

> "Persons habitually resident in the absorbed territory who are nationals of [third] States and at the same time not nationals of the predecessor State cannot be invested with the successor's nationality. On the other hand, stateless persons so resident there are in the same position as born nationals of the predecessor State. There is an 'inchoate right' on the part of any State to naturalize stateless persons resident upon its territory."[39]

(20) Nevertheless, the status of these two categories of persons is different from that of the nationals of the predecessor State. Accordingly, the term "person concerned" includes neither nationals of third States nor stateless persons who were present on the territory of any of the "States concerned" unless they fall into the category of persons who, on the date of succession of States, were entitled to acquire the nationality of the predecessor State, in accordance with its legislation.

---

[39] O'Connell (1956), op. cit., pp. 257-258.

Preamble

Considering that, in connection with recent cases of succession of States, problems concerning nationality have again become a matter of concern to the international community,

Emphasizing that, while nationality is essentially governed by internal law, international law imposes certain restrictions on the freedom of action of States in this field,

Convinced of the need for the codification and progressive development of the rules of international law concerning nationality in relation to the succession of States as a means for ensuring greater juridical security in international relations and strengthening respect for human rights,

Recalling that the Universal Declaration of Human Rights proclaimed the right of every person to a nationality,

(...)

Commentary

(1) In the past, the Commission generally presented its draft articles on issues examined by it without a draft preamble, leaving the care of the elaboration of the preamble and usually also of dispute settlement and final clauses of the future instrument to the diplomatic conference.[40] The Special Rapporteur, however, does not see any reason for the Commission to follow this practice rigidly, in particular when the preamble seems to be perfectly suited for inclusion therein of certain elements which are the corollary of the substantive problems dealt with in the draft articles themselves. Accordingly, he proposes four paragraphs for the preamble to the draft articles on nationality in relation to the succession of States addressing issues which, in his view, should not be omitted. They might not be the only paragraphs to be included in the preamble; the Special Rapporteur leaves it for the Commission to consider whether other provisions should be added thereto.

(2) The first paragraph of the draft preamble indicates the raison d'être and constitutes the driving force behind the task undertaken by the Commission: the concern of the international community as to the resolution of nationality problems in the case of a succession of States. As was borne out in the first and second reports, such concerns have re-emerged in connection with recent cases of succession of States. They have manifested themselves in different ways. The first report makes reference to the work of several international bodies currently dealing with issues of nationality in relation to State

---

[40] The Draft Declaration on Rights and Duties of States and the two Draft Conventions on the Elimination of Future Statelessness, and on the Reduction of Future Statelessness, however, did contain a preamble. See, respectively, Yearbook ... 1949, p. 287, and Yearbook ... 1954, vol. II, p. 143.

succession.[41] In the meantime, considerable progress has been made in such forums. Thus, the Committee of Experts on Nationality of the Council of Europe has prepared a Draft European Convention on Nationality containing, inter alia, provisions regarding the loss and acquisition of nationality in situations of State succession.[42] Another organ of the Council of Europe, the European Commission for Democracy through Law (Venice Commission), adopted in September 1996 a Declaration on the Consequences of State Succession for the Nationality of Natural Persons.[43] As for the problem of statelessness, including statelessness resulting from State succession, it appears to be of growing interest to the Office of the United Nations High Commissioner for Refugees (UNHCR).[44]

(3) The second draft preambular paragraph expresses the idea that, although nationality is essentially governed by internal legislation, it is of direct concern to the international order. State sovereignty in the determination of its nationals does not mean the absence of all rational constraints. The legislative competence of the State with respect to nationality is not absolute.[45] As Rezek has stated, "the sovereign prerogative of promulgating laws on the subject [of nationality] is not a guarantee that all domestic legislation will be enforceable internationally".[46]

(4) The existence of limits to the competence of States in this field was established by various authorities. In its advisory opinion in the case concerning Nationality Decrees Issued in Tunis and Morocco,[47] the Permanent Court of International Justice emphasized that the question whether a matter was solely within the jurisdiction of a State was essentially a relative question, depending upon the development of international relations, and it held that even in respect of matters which in principle were not regulated by international

---

[41] A/CN.4/467, para. 31.

[42] DIR/JUR (97) 2.

[43] Hereinafter "Venice Declaration". Document CDL-NAT(96) 7 rev.

[44] For a review of the recent activities of UNHCR in this field, see Carol A. Batchelor, "UNHCR and Issues Related to Nationality", Refugee Survey Quarterly, vol. 14, No. 3, pp. 91-112. See also the report of the Executive Committee of the Programme of the United Nations High Commissioner for Refugees on the work of its forty-sixth session, Official Records of the General Assembly, Fiftieth Session, Supplement No. 12A (A/50/12/Add.1, para. 20), and the report of the Subcommittee of the Whole on International Protection (A/AC.96/858, paras. 21-27), as well as General Assembly resolution 50/152 of 21 December 1995, entitled "Office of the United Nations High Commissioner for Refugees".

[45] Batiffol and Lagarde, op. cit., pp. 69-70.

[46] Rezek, op. cit., p. 371.

[47] P.C.I.J., 1923, Series B, No. 4, p. 24.

/...

law, the right of a State to use its discretion might be restricted by obligations which it might have undertaken towards other States, so that its jurisdiction became limited by rules of international law.[48]

(5) Similarly, article 2 of the 1929 Harvard Draft Convention on Nationality asserts that the power of a State to confer its nationality is not unlimited.[49] Article 1 of The Hague Convention of 1930 on Certain Questions relating to the Conflict of Nationality Laws provides that, while it is for each State to determine under its own law who are its nationals, such law shall be recognized by other States only "insofar as it is consistent with international conventions, international custom and the principles of law generally recognized with regard to nationality".[50]

(6) The function of international law is mainly to delimit the competence of the predecessor State to retain certain persons as its nationals and of the successor State to claim them as its own. By so doing, international law permits "some control of exorbitant attributions by States of their nationality, by depriving them of much of their international effect", because "the determination by each State of the grant of its own nationality is not necessarily to be accepted internationally without question".[51] The role of international law concerning nationality - at least from the standpoint of general principles and custom - is, therefore, in a certain sense a negative one.[52]

(7) International law cannot, on its own, invalidate or correct the effects of national legislation on the nationality of individuals. While, on the one hand, it places restrictions upon the categories of persons whose nationality is claimed by the successor State, on the other hand, because of the restrictive character of its operation, international law cannot dictate to the predecessor State whether or not that State is obliged to retain those persons

---

[48] See also Oppenheim's International Law, op. cit., p. 852.

[49] Article 2 reads as follows:

> "Except as otherwise provided in this [draft] convention, each State may determine by its law who are its nationals, subject to the provisions of any special treaty to which the State may be a party; but under international law the power of a State to confer its nationality is not unlimited." (see note 23 above)

[50] See Laws concerning nationality, United Nations Legislative Series, ST/LEG/SER.B/4, p. 567.

[51] Oppenheim's International Law, op. cit., p. 853.

[52] See Rezek, op. cit., p. 371; Paul Lagarde, La nationalité française, Paris, Dalloz, 1975, p. 11; Jacques de Burlet, "De l'importance d'un 'droit international coutumier de la nationalité'", Revue critique de droit international privé, 1978, vol. 67, p. 307 et seq.

as its nationals.[53] The rules of international law, Rezek has stated, "are a sound basis for the international denial of nationality claimed by a State. They are not yet a sound basis for justifying a claim of nationality which the State concerned refuses to recognize; for this purpose, the legislation of the said State must prevail."[54]

(8) Aside from its traditional role of delimiting the competence of States in the area of nationality, international law imposes yet another, long-recognized, limitation on their freedom, which derives from principles concerning the protection of human rights. This point had already been raised in connection with the preparations for the 1930 Hague Conference.[55] It was also highlighted by the Inter-American Court of Human Rights, which stated that, while the conferment and regulation of nationality falls within the jurisdiction of the State, this principle is limited by the requirements imposed by international law for the protection of human rights.[56]

(9) The importance of this second type of limitation increased considerably after the Second World War as a result of the impetus given to the protection of human rights. By virtue of these norms and principles, some of the processes of internal law, such as those leading to statelessness or any type of discrimination, have become questionable at the international level. This is true for nationality laws in general, as well as in the particular context of State succession. It is one of the most remarkable attributes of the developing legal framework in which recent cases of succession have taken place.

(10) Unlike the first category of limitations discussed above, the substantive question in this case is not whether the State exercises its discretionary power within the scope of its territorial or personal competence, but whether it does so in a manner consistent with its international obligations in the field of human rights. But as in the case of the first category of limitations (and leaving aside the question of the State's international responsibility for non-fulfilment of its obligations in the area of human rights), this second category of limitations does also not affect the validity of national legislation and its effectiveness within the State concerned.

---

[53] O'Connell (1967), op. cit., p. 499.

[54] Rezek, op. cit., p. 372.

[55] "The scope of municipal laws governing nationality must be regarded as limited by consideration of the rights and obligations of individuals and of other States." League of Nations Conference for the Codification of International Law, Bases for Discussion, vol. I (Nationality), C.73.M.38. 1929.V, Reply of the United States of America, p. 16.

[56] Proposed Amendments to the Naturalization Provisions of the Political Constitution of Costa Rica (1984), ILR, vol. 79, p. 284.

(11) The idea on which the second draft preambular paragraph is based has received broad support both in the Commission and in the Sixth Committee.[57] The debate in those forums indicates general acceptance of the fact that nationality is mainly governed by internal law and that international law cannot substitute itself for internal law in this respect, but also that the predecessor or successor State, as the case may be, cannot invoke the argument that nationality is primarily a matter of internal law as a justification for non-compliance with its relevant obligations under international law.

(12) Some members of the Commission pointed out that it was, in particular, the development of human rights law which imposed new restrictions upon the discretionary power of States with respect to nationality.[58] However, a view was also expressed that the role played by international law, including human rights law, should not be overemphasized, since both the literature and jurisprudence had recognized the exclusive character of the competence of the State in determining which individuals were its nationals.[59] It was nevertheless accepted that it was precisely this role, no matter how limited, of international law in the specific context of State succession which was to be the focus of the Commission's work.[60] Accordingly, the text suggested for the second preambular paragraph tries to reflect the relationship between internal and international law in the field of nationality in such a manner as to reconcile both points of view.

(13) The third draft preambular paragraph underlines the need for the codification and progressive development of international law in the area under consideration, i.e. nationality in relation to the succession of States. As to its substance, such a statement seems to be fully justified. D. P. O'Connell, while recognizing that "[t]he effect of change of sovereignty upon the nationality of the inhabitants of the [territory concerned] is one of the most difficult problems in the law of State succession", stressed as early as 1956 that "[u]pon this subject, perhaps more than any other in the law of State succession, codification or international legislation is urgently demanded".[61]

(14) The recent growth in the number of new States has further added to the need to shed more light on the rules concerning nationality which might be applicable in the event of State succession.

---

[57] See Official Records of the General Assembly, Fiftieth Session, Supplement No. 10 (A/50/10), para. 183; see also A/C.6/51/SR.37, para. 30; A/C.6/51/SR.39, para. 12.

[58] See statements by Messrs. Crawford, Fomba (A/CN.4/SR.2388), Al-Baharna (A/CN.4/SR.2389), Kabatsi, Yamada and Kusuma-Atmadja (A/CN.4/SR.2390).

[59] Official Records of the General Assembly, Fiftieth Session, Supplement No. 10 (A/50/10), para. 184.

[60] Ibid., para. 183.

[61] O'Connell (1956), op. cit., pp. 245 and 258.

(15) During the consideration of the report of the Commission by the Sixth Committee at the fiftieth session of the General Assembly, delegations expressing their views on chapter III of the report, which concerned the topic of State succession and its impact on the nationality of natural and legal persons[62] underlined the need to address this problem and observed, at the same time, that the Commission's work on the subject pertained both to codification and to the progressive development of international law.[63] Similar views were expressed during the debate at the fifty-first session of the General Assembly.[64] In response to such need, the General Assembly requested the International Law Commission to undertake the substantive study of the question of the nationality of natural persons in relation to the succession of States and approved the ambitious calendar for the completion of the first reading of the draft articles on the topic.[65]

(16) The text of the third draft preambular paragraph follows the language of analogous paragraphs of the preambles to the Vienna Conventions on Succession of States of 1978 and 1983.[66] In addition to the alteration concerning the "rules of international law concerning nationality in relation to the succession

---

[62] See the summary records of the debate (A/C.6/50/SR.13, 15-16, 18 and 20-24) as well as the topical summary of the discussion held in the Sixth Committee of the General Assembly during its fiftieth session prepared by the Secretariat (A/CN.4/472/Add.1, paras. 1-29).

[63] A/CN.4/472/Add.1, paras. 1 and 3. Similarly, the authors of the 1929 Harvard Draft Convention on Nationality did not believe that it was sufficient to base their work on a mere codification of existing customary law. They recognized that,

> "while in some of its provisions [the draft convention] declares what is believed to be existing international law, [it] is not limited to a statement of existing law, and attempts to formulate certain provisions which, if adopted, would make new law".

Comments to the 1929 Harvard Draft Convention on Nationality, American Journal of International Law, vol. 23 (Special Suppl.) (1929), p. 21.

[64] See, e.g., A/C.6/51/SR.37, para. 30.

[65] Official Records of the General Assembly, Fifty-first Session, Supplement No. 10 (A/51/10), para. 88 (c).

[66] The third preambular paragraph of the Vienna Convention on the Succession of States in respect of Treaties states: "Convinced, [...] of the need for the codification and progressive development of the rules relating to succession of States in respect of treaties as a means for ensuring greater juridical security in international relations". The third preambular paragraph of the Vienna Convention on Succession of States in respect of State Property, Archives and Debts contains the same language, the only difference being the reference to "the rules relating to succession of States in respect of State property, archives and debts".

of States", which is self-explanatory, the paragraph spells out that the strengthening of respect for human rights is still another purpose of the codification and progressive development of the above-mentioned rules. Such addition to the language of the Vienna Conventions seems to be desirable both because the present draft articles, contrary to the two Vienna Conventions, deal with problems concerning the relationship between States and individuals on matters which have a direct impact on their human rights, and in view of the emphasis placed by many States on the fact that the Commission should always have in mind human rights considerations when dealing with the present topic.[67]

(17) Indeed, States considered it of paramount importance that the Commission's work on the topic should aim at the protection of the individual against any detrimental effects in the area of nationality resulting from State succession, especially statelessness.[68] The human rights aspect of the topic has also been particularly highlighted by the Commission, which further stressed the need to avoid the impression that the articles are of a purely "technical" character, i.e., intended simply to harmonize national legislations, as is the case of a number of instruments concerning nationality issues adopted in the past.

(18) The fourth draft preambular paragraph refers to the provisions of the Universal Declaration of Human Rights concerning the right to a nationality. While the concept of the right to a nationality and its usefulness in situations of State succession was generally accepted by the members of the Commission,[69] it would nevertheless be unwise to draw any substantive conclusions from the debate in order to answer the question as to whether this concept or some of its elements belong to the realm of lex lata. It would nonetheless be difficult to object to the view that the right to a nationality embodied in article 15 of the

---

[67] See A/CN.4/472/Add.1, para. 6; A/C.6/51/SR.37, para. 23; A/C.6/51/SR.37, para. 30; A/C.6/51/SR.38, para. 36; A/C.6/51/SR.39, para. 43. Similar observations are quite frequent in recent writings. As one author stated:

> "[T]he primary purpose of the law of State succession is to ensure social and political stability at a time when the transfer of sovereign powers is conducive to instability. Stability in this case may mean the refusal of [solutions] contrary to humanitarian considerations."

Ruth Donner, The Regulation of Nationality in International Law, 2nd ed. (Irvington-on-Hudson, New York, Transnational Publishers, 1994), p. 262.

[68] A/CN.4/472/Add.1, paras. 5-6.

[69] During the Commission's debate concerning the Special Rapporteur's comments, in his first report, on the individual's right to a nationality, several members stated that they regarded the right to a nationality as central to the work, placing special emphasis on article 15 of the Universal Declaration of Human Rights. At the same time, other members noted that the International Covenant on Civil and Political Rights reflected a reluctance to recognize that right as a general rule. (Official Records of the General Assembly, Fiftieth Session, Supplement No. 10 (A/50/10), para. 189).

Universal Declaration of Human Rights "must be understood to provide at least moral guidance" for the legislation on citizenship when new States are created or old ones resume their sovereignty.[70]

(19) The reference to the right to a nationality in the preambular part of the draft articles, in the proposed form, renders the discussion of the above questions irrelevant. Simply stated, whatever the answer to the question of the actual character of the right to a nationality, the accepted premise is that State succession does not affect this right (whether it has the character of lex lata or lex ferenda).

---

[70] Asbjorn Eide, "Citizenship and International Law: The Challenge of Ethno-nationalism", in Citizenship and Language Laws in the Newly Independent States of Europe, seminar held at Copenhagen, 9-10 January 1993, p. 9.

PART I

GENERAL PRINCIPLES CONCERNING NATIONALITY IN RELATION TO THE SUCCESSION OF STATES

Commentary

The function of the title of Part I is to indicate that certain principles concerning nationality are common to all types of succession of States, contrary to other principles or rules, which apply only in relation to specific categories of State succession. It is in this sense that the principles formulated in Part I are "general". The adjective "general" is without prejudice to the question as to which of these principles may be considered as forming part of general international law.

Article 1

Right to a nationality

> 1. Every individual who, on the date of the succession of States, had the nationality of the predecessor State, irrespective of the mode of acquisition of that nationality, or was entitled to acquire such nationality in accordance with the provisions of the internal law of the predecessor State, has the right to the nationality of at least one of the States concerned.
>
> 2. If a child born after the date of the succession of States whose parent is a person mentioned in paragraph 1 of this article has not acquired the nationality of at least one of the States concerned, or that of a third State, such child has the right to acquire the nationality of the State concerned on whose territory or otherwise under whose jurisdiction (hereafter "on the territory") he or she was born.

Commentary

(1) Paragraph 1 can be viewed as an application of the general concept of the right to a nationality (art. 15 of the Universal Declaration of Human Rights) to the case of State succession. Despite the fact that the provisions of the Universal Declaration of Human Rights have given rise to different interpretations in the Commission,[71] it seems that the existence of the right to a nationality is accepted in situations where it is possible to determine the

---

[71] See the commentary to the fourth draft preambular paragraph. For a broader spectrum of views, see also Johannes M. M. Chan, "The right to a nationality as a human right: The current trend towards recognition", Human Rights Law Journal, vol. 12, Nos. 1-2 (1991), pp. 1-14.

/...

State vis-à-vis which the person concerned would be entitled to present a claim for nationality.[72]

(2) In the context of State succession, such determination is feasible. The circle of individuals having the right to a nationality is circumscribed in paragraph 1. It encompasses all individuals who, on the date of the succession of States, had the nationality of the predecessor State or were entitled to acquire such nationality in accordance with the provisions of the internal law of the predecessor State. In the following articles, these persons are referred to as "persons concerned" (see also the footnote to the title of the draft articles). The right to a nationality is vested in every person who qualifies under paragraph 1, without distinction as to the mode of acquisition of the predecessor State's nationality, i.e. whether the nationality was acquired by birth (by the application of the principles of jus soli or of jus sanguinis) or by naturalization. It is important to spell out this element in order to avoid any discrimination among persons concerned on the basis of the mere fact that they acquired the nationality of the predecessor State by different modalities.

(3) Paragraph 1 stipulates the right of a person concerned to the nationality of at least one of the States concerned. Indeed, in order to give effect to the right to a nationality, it is necessary, as a second step, to identify the State which can be requested to grant its nationality to the person concerned. Such person may either have the right to acquire the nationality of the successor State or one of the successor States when there are several successor States, or to maintain the nationality of the predecessor State if that State continues to exist after the territorial change. Accordingly, the right embodied in paragraph 1 in the most general terms has to be given more concrete form in the light of other provisions of the present draft articles. The identification of the State which is under the obligation to grant such right depends upon the type of succession of States and the nature of the links that persons concerned may have with one or more States concerned.

(4) This approach is in harmony with the opinion voiced by some members of the Commission that, if a right to nationality were recognized, there was first a need to identify a genuine link between the person and the State obligated to grant its nationality. In other words, the concept of an individual's right to a nationality within the context of State succession could be better pinpointed through the application of the criterion of genuine link.[73]

---

[72] See the commentary by Rezek, according to which article 15 of the Universal Declaration sets out a "rule which evokes unanimous sympathy, but which is ineffective, as it fails to specify for whom it is intended". Rezek, op. cit., p. 354.

[73] Official Records of the General Assembly, Fiftieth Session, Supplement No. 10 (A/50/10), para. 186.

(5) In most cases, all the links of an individual are to a single State. This supports the general assumption that the successor State is under an obligation to grant its nationality to a core body of its population.[74]

(6) Certain categories of persons concerned, however, may have competing links to two or even more States concerned. In this event, the person might either end up with multiple nationalities or, having been given the right of choice, end up with only one nationality.

(7) Unification of States is a situation where a single State - the successor State - is the addressee of the obligation to grant nationality to persons concerned, irrespective of the effectiveness of the link between that State and such persons when there is no link to any other State. In other types of succession of States, such as dissolution and separation or transfer of territory, the major part of the population has most, if not all, of its links to one of the States concerned by the territorial change. Thus, for example, in the case of dissolution, the majority of the population falls within the category of persons resident in the territory where they were born and with which they are bound by many other links, including family ties, profession, etc.

(8) The discussion above demonstrates that the major objection against the recognition of the "right to a nationality" in the narrow sense, i.e., the argument that it is not possible to identify the State which is the addressee of the corollary "obligation to grant the nationality", may be countered. Accordingly, there is no reason to deny the "right to a nationality" to most individuals just because for some others the identification of the State upon which such obligation falls is more difficult.

(9) But even for those individuals who may have links to two or more States concerned, the identification of the above State need not be a real problem, provided that a right of choice (option) is recognized for such persons as part of their right to a nationality.

(10) With all this in mind, the Working Group concluded that, in situations resulting from State succession, every person whose nationality might be affected by the change in the international status of the territory had the right to the nationality of at least one of the States concerned.[75]

(11) Paragraph 2 deals with the problem of children born to persons referred to in paragraph 1 after the date of State succession, but before the

---

[74] See the view expressed by some representatives in the Sixth Committee (A/CN.4/472/Add.1, para. 17). This obligation was also considered to be a logical consequence of the fact that every entity claiming statehood must have a population. See the statement by the delegation of Austria (A/C.6/50/SR.23, para. 31).

[75] Official Records of the General Assembly, Fifty-first Session, Supplement No. 10 (A/51/10), para. 86 (a).

nationality of those persons has been established. The first question to be answered is why this problem should be addressed in the present draft articles.

(12) It follows from the title of the topic under consideration that the Commission is required to study the question of nationality solely in relation to the phenomenon of State succession. Questions relating to changes of nationality which occur prior to or as a result of events or acts prior to the date of the succession of States are therefore excluded from the scope of the present exercise. Similarly, all questions relating to the acquisition or loss of nationality after the date of the succession of States other than the acquisition or loss generated by the State succession should also be excluded. It should not be forgotten, however, that in the majority of cases successor States take time to adopt their laws on nationality and that, in the interim period between the date of the succession of States and the date of the adoption of the law on nationality, human life continues, children are born, individuals marry and so forth. There may therefore be problems concerning nationality which, although they do not directly result from the change of sovereignty as such, nevertheless deserve the Commission's attention. One of these problems is the object of paragraph 2 of the present article.

(13) The Working Group recognized the need for an exception from the rigid definition _ratione temporis_ of the present topic in order to cover those children born shortly after the State succession, during the interim period when the personal status of their parents might be unclear. Given the fact that, in a considerable number of legal orders, the nationality of children depends to a large extent on that of their parents, the uncertainty about the parents' nationality can have a direct impact on the nationality of a child born during this interim period. This uncertainty can be lifted with the final settlement of the problem of the parents' nationality, but can also remain if, for example, a parent dies in the meantime. That is why a specific provision concerning the nationality of newborn children can be useful.

(14) The inclusion of paragraph 2 is justified in the light of the importance that several instruments attach to the rights of children, including their right to acquire a nationality. Thus, principle 3 of the Declaration of the Rights of the Child provides that:

> "The child shall be entitled from his birth to a name and a nationality."

Article 24, paragraph 3, of the International Covenant on Civil and Political Rights guarantees every child the right to acquire a nationality. Article 7, paragraph 1, of the Convention on the Rights of the Child provides that:

> "The child [...] shall have the right from birth to a name, the right to acquire a nationality ..."[76]

---

[76] Paragraph 2 of the same article provides, moreover, that "States Parties shall ensure the implementation of these rights ... in particular where the child would otherwise be stateless".

From the joint reading of this provision and that of article 2, paragraph 1, of the Convention, according to which "States Parties shall respect and ensure the rights set forth in the present Convention to each child within their jurisdiction without discrimination of any kind" (emphasis added), it follows that, unless the child acquires the nationality of another State, he or she has, in the last instance, the right to the nationality of the State on the territory of which he or she was born.

(15) It is also useful to recall that article 9 of the 1929 Harvard Draft Convention on Nationality read:

> "A State shall confer its nationality at birth upon a person born within its territory if such person does not acquire another nationality at birth."[77]

(16) Likewise, article 20 of the American Convention on Human Rights (the "Pact of San José, Costa Rica") of 22 November 1969 stipulates that:

> "Every person has the right to the nationality of the State in whose territory he was born if he does not have the right to any other nationality."

(17) During the debate in the Commission at its forty-seventh session it was noted that the provisions of international instruments concerning the right of a child to a nationality suggest that there is a higher degree of recognition of such right than is the case with the right of an adult to a nationality and that the Commission should be aware of this element in its work on the present topic.[78]

(18) The text of paragraph 2 of article 1 draws its inspiration from the above-mentioned instruments. The argument in favour of uniformity in approach is further supported by the fact that, where the predecessor State is a party to any of the above-mentioned two Conventions, their provisions could be applicable, by virtue of the rules of succession in respect of treaties, to the successor State, including as regards the situation envisaged in paragraph 2 of article 1 of the present draft articles.

(19) Paragraph 2 is limited to the solution of the problem concerning the nationality of children born within the territory of the States concerned. It does not envisage the situation where a child whose parent is a person referred to in paragraph 1 was born in a third State. Extending the scope of application of the rule set out in paragraph 2 to situations where the child was born in a third State would mean to impose a duty on States other than those involved in the succession of States. While it is true that those third States that are parties to the Convention on the Rights of the Child may already have such obligation in any event, it is also true that this problem exceeds the scope of the present exercise, which should remain limited to problems where a "person

---

[77] See note 23 above.

[78] See the statement by Mr. Tomuschat (A/CN.4/SR.2387).

concerned" is on one side of the legal bond and a "State concerned" on the other.

(20) The major consequence that the Commission has drawn from the existence of the right to a nationality within the context of State succession was the existence of a concomitant obligation of States concerned to negotiate so that the persons concerned could actually acquire a nationality.[79] Such an obligation is envisaged in draft article 15.

Article 2

Obligation of States concerned to take all reasonable measures to avoid statelessness

> The States concerned are under the obligation to take all reasonable measures to avoid persons who, on the date of the succession of States, had the nationality of the predecessor State becoming stateless as a result of the said succession of States.

Commentary

(1) The obligation of the States involved in the succession to take all necessary measures in order to avoid the occurrence of statelessness is a corollary of the right of the persons concerned to a nationality. In the case of a positive conflict of nationality laws between the States concerned, the problem of statelessness does not arise. A negative conflict of nationality laws, however, may lead to statelessness.

(2) In his first report, the Special Rapporteur stated that, in view of the recent development of human rights standards, including a number of obligations regarding nationality, it is no longer possible to maintain without any reservation the traditional opinion expressed by O'Connell in 1956, according to which:

> "Undesirable as it may be that any persons become stateless as a result of a change of sovereignty, it cannot be asserted with any measure of confidence that international law, at least in its present stage of development, imposes any duty on the successor State to grant nationality."[80]

---

[79] See the discussion following the statement by Mr. Bowett (A/CN.4/SR.2387).

[80] O'Connell (1967), op. cit., p. 503. The Special Rapporteur also noted another author's view that "apart from treaty a new State is not obliged to extend its nationality to all persons resident on its territory" (James Crawford, The Creation of States in International Law (Oxford, Clarendon Press, 1979), p. 41 (emphasis added), reflecting a more cautious approach in this respect. The view of the Special Rapporteur was shared by UNHCR experts

/...

Whatever the merit of O'Connell's evaluation of lex lata at the time, he was already stressing then the urgent need for codification in this field, in particular, because "[i]t is undesirable that, as a result of change of sovereignty, persons should be rendered stateless against their wills."[81]

(3) The first efforts to reduce, through the adoption of international conventions, instances of statelessness or, where that is not possible, to render the position of stateless persons less difficult date back to 1930. The Hague Codification Conference of 1930 adopted a number of provisions aimed at reducing the possibility of statelessness, as well as a unanimous recommendation to the effect that it was desirable that, in regulating questions of nationality, States should make every effort to reduce so far as possible cases of statelessness. Among the multilateral treaties relating to this problem are the 1930 Hague Convention on Certain Questions relating to the Conflict of Nationality Laws,[82] its Protocol relating to a Certain Case of Statelessness and its Special Protocol concerning Statelessness, as well as the 1954 Convention relating to the Status of Stateless Persons[83] and the 1961 Convention on the Reduction of Statelessness.[84]

(4) It is true that only very few provisions of the above Conventions directly address the issue of nationality in the context of State succession (such as, for example, article 10 of the Convention on the Reduction of Statelessness, quoted in paragraph (9) below). Nevertheless, they provide useful guidance to the States concerned by offering solutions which can mutatis mutandis be used by national legislators in search of solutions to problems arising from territorial change.

(5) The observation has been made that:

> "The general remedies for statelessness of which the legislator can make use consist first of all of organizing the granting and acquisition of nationality in such a way as to preclude anyone who has a link to the country sufficiently genuine that other countries do not regard him as their national from escaping its control ... It is, however, mainly in the organization of cases of loss of nationality that the concern with avoiding statelessness can be seen. In comparative law, for example, it has been observed that the renunciation of nationality not conditioned by the acquisition of another allegiance has become obsolete."[85]

(see "The Czech and Slovak citizenship laws and the problem of statelessness", document prepared by UNHCR, February 1996, para. 25).

[81] O'Connell (1956), op. cit., p. 258.

[82] See note 50 above.

[83] United Nations, Treaty Series, vol. 360, p. 117.

[84] Ibid., vol. 989, p. 175.

[85] Batiffol and Lagarde, op. cit., pp. 82-83.

(6) There is a growing awareness among States of the compelling need to fight the plight of statelessness in general as well as in relation to the succession of States. One of the techniques used by the legislators of successor States has been to enlarge the circle of persons entitled to acquire their nationality by granting a right of option to that effect to those who would otherwise become stateless. Thus, e.g., the Burma Independence Act provided, inter alia, that a person who ceased to be a British subject under the Act and who upon independence neither became, nor became qualified to become, a citizen of the independent country of Burma had the right of election of its citizenship.[86]

(7) Similarly, with the clear intention to prevent a situation where a former national of Czechoslovakia would not acquire the nationality of either of the two successor States (and eventually become stateless), the Law on Citizenship of the Czech Republic provided in its article 6 that:

> "Natural persons who were on 31 December 1992 citizens of the Czech and Slovak Federal Republic but had neither the citizenship of the Czech Republic [nor that of] the Slovak Republic[87] may elect the citizenship of the Czech Republic by declaration."[88]

(8) Another example is that of article 47 of the Yugoslav Citizenship Law (No. 33/96) providing that Yugoslav citizenship could be acquired by any citizen of the Socialist Federal Republic of Yugoslavia who was a citizen of another republic of that federation and who resided in the territory of Yugoslavia on the date of the proclamation of the Constitution of the Federal Republic of Yugoslavia, and his or her children born after that date, as well as any citizen of another republic of the Socialist Federal Republics of Yugoslavia who had accepted to serve in the Yugoslav army, and members of his immediate family, if they had no other citizenship.[89]

(9) The most effective measure that the States concerned may take is to conclude an agreement by virtue of which the occurrence of statelessness would be precluded. This is also the philosophy underlying article 10 of the 1961 Convention on the Reduction of Statelessness, which stipulates that:

> "1. Every treaty between Contracting States providing for the transfer of territory shall include provisions designed to secure that

---

[86] Sect. 2, subsect. (3), Materials on succession of States in respect of matters other than treaties, United Nations Legislative Series, ST/LEG/SER.B/17, p. 146.

[87] Reference to citizenship in this instance means the "secondary" citizenship of the component unit of the Czechoslovak Federation, which later became the main criterion for the ipso facto acquisition of the nationality of the Czech or Slovak Republics as independent States.

[88] See the materials submitted by the Czech Republic.

[89] See the materials submitted by Yugoslavia.

/...

> no person shall become stateless as a result of the transfer. A Contracting State shall use its best endeavours to secure that any such treaty made by it with a State which is not a Party to this Convention includes such provisions.
>
> "2. In the absence of such provisions a Contracting State to which territory is transferred or which otherwise acquires territory shall confer its nationality on such persons as would otherwise become stateless as a result of the transfer or acquisition."

(10) The view that "it is a responsibility of States to avoid statelessness" was one of the main premises on which experts of the Council of Europe based their examination of nationality laws in recent cases of State succession in Europe.[90] This seems to apply, in their opinion, both to the content of the legislation and to its application. Thus, "it cannot be accepted that persons become stateless because of lack of proper application of administrative procedures."[91]

(11) The seriousness of the problem of statelessness in situations of State succession has generally been recognized by the Commission,[92] which considered that the solution of this problem should take priority over the consideration of other problems of conflicts of nationality.[93]

(12) The assumption that States concerned should be under the obligation to prevent statelessness was one of the basic premises on which the Working Group based its deliberations[94] and received clear support in the Commission. If one were to make a parallelism between a territory and its population - both constitutive elements of statehood - as there is no precedent of a succession of States in which even a small part of the State territory was left by States concerned as "terra nullius", why should such States be allowed to leave some persons concerned stateless as a result of the succession?

---

[90] See e.g., "Report of the Experts of the Council of Europe on the Citizenship Laws of the Czech Republic and Slovakia and their Implementation", Strasbourg, 2 April 1996, para. 60.

[91] Ibid., para. 54.

[92] Official Records of the General Assembly, Fiftieth Session, Supplement No. 10 (A/50/10), para. 189.

[93] The Special Rapporteur highlighted in his first report the problems of positive conflicts of nationality (dual nationality, multiple nationality) and negative conflicts of nationality (statelessness) arising from State succession (A/CN.4/467, para. 106). See also Official Records of the General Assembly, Fiftieth Session, Supplement No. 10 (A/50/10), para. 206.

[94] Official Records of the General Assembly, Fiftieth Session, Supplement No. 10 (A/50/10), annex, para. 7; ibid., Fifty-first Session, Supplement No. 10 (A/51/10), chap. IV, para. 86 (b).

(13) During the Commission's consideration of the report of the Working Group, it was said that, although the basic principle that States, including new States, were under an obligation to avoid statelessness in situations of State succession was not at present a rule of international law, it should be the aim of the Commission to make it one.[95]

(14) In the Sixth Committee, statelessness has also been generally recognized as a serious problem deserving the primary attention of the Commission.[96] No delegation challenged the Working Group's premise regarding the obligation not to create statelessness as a result of State succession.

(15) The text of article 2 does not set out an obligation of result. It is an obligation of conduct. In the case of unification of States, this distinction has no practical significance, for the obligation "to take all reasonable measures to avoid" persons concerned becoming stateless means, in fact, the obligation of the successor State to grant its nationality in principle to all such persons.[97]

(16) However, the distinction between obligation of result and obligation of conduct is relevant in other cases of succession of States where at least two States concerned are involved. Obviously, nobody can consider each particular State concerned to be responsible for all cases of statelessness resulting from the succession. A State can reasonably be asked only to take measures within the scope of its competence as delimited by international law. Accordingly, not every State concerned has the obligation to grant its nationality to (or, where the predecessor State is also a State concerned, the obligation not to withdraw its nationality from) every single person concerned. Otherwise, the result would be, first, dual or multiple nationality on a large scale (prejudicing at the same time the freedom of every State concerning its policy in matters of dual/multiple nationality) and, second, the creation, also on a large scale, of legal bonds of nationality without genuine link.

(17) Thus, the principle stated in article 2 cannot be more than a general framework upon which other, more specific, obligations are based. The elimination of statelessnes is a final result to be achieved by means of the application of the whole complex set of draft articles, in particular through agreement with other States concerned. This demonstrates once again the importance of the obligation set out in article 15.

(18) As is the case with the right to a nationality set out in article 1, statelessness is to be avoided under article 2 in relation to "persons concerned", i.e., persons who, on the date of the succession of States, were nationals of the predecessor State. This does not therefore encompass persons resident in the territory of the successor State who had been stateless under

---

[95] See the statement by Mr. Crawford (A/CN.4/SR.2413).

[96] See A/CN.4/472/Add.1, para. 6; A/C.6/51/SR.37, para. 32; A/C.6/51/SR.39, para. 44; A/C.6/51/SR.41, para. 65.

[97] For the exceptions, see draft article 4.

the regime of the predecessor State. The successor State has certainly a discretionary power to grant its nationality to such stateless persons. But the problem would be qualitatively different if it were envisaged that that State had an obligation to do so.[98]

Article 3

Legislation concerning nationality and other connected issues

> 1. Each State concerned should enact laws concerning nationality and other connected issues arising in relation to the succession of States without undue delay. It should take all necessary measures to ensure that persons concerned will be apprised, within a reasonable time period, of the impact of its legislation on their nationality, of any choices they may have thereunder, as well as of the consequences that the exercise of such choices will have on their status.
>
> 2. When providing for the ex lege acquisition of nationality in relation to the succession of States, the legislation of the States concerned should provide that such acquisition of nationality takes effect on the date of the succession of States. The same would apply for the acquisition of nationality following the exercise of an option, if the persons concerned would otherwise be stateless during the period between the date of the succession of States and the date of the exercise of such option.

Commentary

(1) In the literature, it is generally accepted that "it is not for international law but for the internal law of each State to determine who is, and who is not, to be considered its national".[99] The State, and the State

---

[98] See also the following debate between two delegations in the Sixth Committee: in the view of one representative, it was desirable, for the purpose of preventing statelessness, for the successor State to grant its nationality to permanent residents of what became the territory of the successor State who on the date of succession were or became stateless, and even to persons born in such territory who resided outside that territory and, on the date of succession, were or became stateless (A/CN.4/472/Add.1, para. 18). Another representative, nevertheless, wondered why a person who had been stateless under the regime of the predecessor State and who resided in the territory of the successor State should acquire the nationality of the latter merely as a consequence of State succession (ibid.).

[99] Oppenheim's International Law, op. cit., p. 852. As Rezek has also stated, "each State should enact laws concerning its own nationality, provided that the general rules of international law, and any specific rules which might be binding on it, have been observed." Rezek, op. cit., p. 341.

alone, is entitled to decide on this important matter. Nationality is thus essentially an institution of the internal laws of States and, accordingly, the international application of the notion of nationality in any particular case must be based on the nationality law of the State in question.[100] The law of each State "determines who are its nationals, both on the basis of origin and as regards the conditions governing the acquisition or subsequent loss of its nationality".[101]

(2) The principle that it is for each State to determine under its own law who are its nationals was confirmed in article 1 of the 1930 Hague Convention on Certain Questions relating to the Conflict of Nationality Laws.[102] This principle was also asserted by the Permanent Court of International Justice in its opinion with regard to the Nationality Decrees Issued in Tunis and Morocco,[103] and in its opinion on the question concerning the Acquisition of Polish Nationality,[104] and it was reiterated by the International Court of Justice in the Nottebohm case.[105]

(3) The role of internal law as the principal source of nationality is also recognized in cases of changes of nationality resulting from a succession of States, often termed "collective naturalizations". Article 13 of the Bustamante Code, for example, stipulates that:

> "In collective naturalizations, in case of the independence of a State, the law of the acquiring or new State shall apply, if it has established in the territory an effective sovereignty which has been recognized by the State trying the issue, and in the absence thereof that of the old State, all without prejudice to the contractual stipulations between the two interested States, which shall always have preference."[106]

(4) In the same vein, O'Connell refers to the practice of English courts, concluding that:

---

[100] Oppenheim's International Law, op. cit., p. 853.

[101] Batiffol and Lagarde, op. cit., p. 58. According to Crawford, "[i]t appears that the grant of nationality is a matter which only States by their municipal law (or by way of treaty) can perform. Nationality is thus dependent upon statehood, not the reverse" (op. cit., p. 40).

[102] See note 50 above.

[103] P.C.I.J., 1923, Series B, No. 4, p. 24.

[104] Ibid., No. 7, p. 16.

[105] I.C.J. Reports, 1955, p. 4.

[106] See "Code of Private International Law" (Code Bustamante), League of Nations, Treaty Series, vol. LXXXVI, No. 1950.

> "[T]he question to what State a person belongs must ultimately be settled by the municipal law of the State to which he claims or is alleged to belong. It is the municipal law of the predecessor State which is to determine which persons have lost their nationality as a result of the change; it is that of the successor State which is to determine which persons have acquired its nationality."[107]

(5) During the last few years, a number of States confronted with State succession or resumption of independence have adopted new nationality laws or have re-enacted nationality laws dating from the period prior to the Second World War.[108]

---

[107] O'Connell (1967), op. cit., p. 501.

[108] See, for example:

- Belarus: Law on Citizenship of the Republic of Belarus, No 1181-XII of 18 October 1991, as amended by Law No.2410-XII of 15 June 1993; Proclamation of the Supreme Soviet of the Republic of Belarus on the entry into force of the Law on 15 June 1993;
- Croatia: Law on Croatian Nationality of 28 June 1991; Law on Amendments and Supplements to the Law on Croatian Nationality of 8 May 1992;
- Czech Republic: Law on Acquisition and Loss of Citizenship of 29 December 1992;
- Eritrea: Eritrean Nationality Proclamation 21/1992 of 6 April 1992;
- Estonia: Law on Citizenship (1938), re-enacted by the Resolution of the Supreme Council on the Application of the Law on Citizenship of 26 February 1992; Law on Estonian Language Requirements for Applicants for Citizenship of 10 February 1993;
- Latvia: Law on Citizenship (1919), re-enacted by the Resolution of the Supreme Council on the Renewal of the Republic of Latvia Citizens' Rights and Fundamental Principles of Naturalization of 15 October 1991;
- Lithuania: Law on Citizenship of 10 December 1991; Resolution of the Supreme Council of the Republic of Lithuania on the Procedure for Implementing the Republic of Lithuania Law on Citizenship of 11 December 1991;
- Slovenia: Law on Citizenship of 5 June 1991;
- Slovakia: Law on Acquisition and Loss of Citizenship of 19 January 1993;

/...

(6) Draft article 3 is based on the postulate of the primary function of internal law with regard to nationality. Its main focus, however, is the problem of the timeliness of internal legislation.[109] In this respect, the practice of States varies. While in some cases the legislation concerning nationality is enacted at the time of the succession of States or even before it, in other cases the nationality laws were enacted after the date of the succession, sometimes even much later.[110] To request from States concerned that relevant legislation be enacted at the time of succession would not be realistic. In some situations, for instance, where new States are born as a result of a turbulent process where the territorial limits are unclear, this would even be impossible. Accordingly, paragraph 1 sets out the requirement that States concerned enact laws concerning nationality and other connected issues arising in relation with the succession of States "without undue delay". Depending upon the circumstances, the period which can be considered as not amounting to "undue delay" may be different for each State concerned, even in relation to the same succession. Indeed, the predecessor State and the successor State born as a result of separation will find themselves in very different positions.

- Ukraine: Law on the Legal Succession of Ukraine of 12 September 1991; Law on Citizenship of Ukraine of 8 October 1991;

- Yugoslavia: Yugoslav Citizenship Law, Sluzebni list SRJ, No. 33/96.

For legislation on the issue of nationality, including the effects of State succession on nationality, previously compiled by the Codification Division, Office of Legal Affairs of the Secretariat of the United Nations, see Laws concerning nationality, op. cit., and Supplement thereto (ST/LEG/SER.B/9), and Materials on succession of States, op. cit.

[109] The term "legislation of States" should be interpreted broadly. As Rezek has stated, it "includes more than the texts drafted by the parliament". Rezek, op. cit., p. 372.

[110] Brownlie cites in this connection a decision by an Israeli court concerning the 1952 law on Israeli nationality which demonstrates the difficulties that arise in such cases. According to the judge,

> "[s]o long as no law has been enacted providing otherwise, my view is that every individual who, on the date of the establishment of the State of Israel was resident in the territory which today constitutes the State of Israel, is also a national of Israel. Any other view must lead to the absurd result of a State without nationals - a phenomenon the existence of which has not yet been observed."

Ian Brownlie, "The Relations of Nationality in Public International Law", British Year Book of International Law, vol. 39 (1963), p. 318. In another case, however, the judge considered that Israeli nationality had not existed prior to the adoption of the law in question. Ibid.

(7) The main concern that the Working Group had in mind when discussing this particular problem was that persons concerned should be apprised, within a reasonable time period, of the impact of a State's legislation on their nationality, of any choices they may have thereunder, as well as of the consequences that the exercise of such choices will have on their status.[111] This idea is reflected in the last sentence of paragraph 1.

(8) Paragraph 2 addresses another problem, which is nevertheless closely connected to the issue dealt with in paragraph 1. If the legislation enacted after the date of the succession of States did not have a retroactive effect, statelessnes, even if only temporary, could ensue. During the discussion of the first report, some members of the Commission suggested that the possibility of creating a set of "presumptions" should be studied, one of them being the presumption that the acquisition of nationality upon succession takes effect from the date of such succession.[112]

(9) The Working Group opted for a different approach, more consistent with the basic premise concerning the primary role of internal law in the field of nationality. It formulated the recommendation that the legislation concerning the ex lege acquisition of nationality in relation to the succession of States should provide that such acquisition of nationality takes effect on the date of the succession of States. This idea is set out in paragraph 2, which moreover extends its application to the acquisition of nationality following the exercise of an option, provided that the persons concerned would otherwise be stateless during the period between the date of the succession of States and the date of the exercise of such option.

Article 4

Granting of nationality to persons having their habitual residence in another State

1. A successor State does not have the obligation to grant its nationality to persons concerned if they have their habitual residence in another State and also have the nationality of that State.

2. A successor State shall not impose its nationality on persons who have their habitual residence in another State against the will of such persons, unless they would otherwise become stateless.

---

[111] See Official Records of the General Assembly, Fiftieth Session, Supplement No. 10 (A/50/10), annex, para. 24.

[112] See the statement by Mr. Crawford (A/CN.4/SR.2388).

Commentary

(1) Provisions concerning the granting and withdrawal of nationality in relation to specific types of succession of States can be found in part II of the present draft articles. Nevertheless, there are some rules which constitute exceptions to the provisions of part II and which are common to several or even all categories of succession of States. Accordingly, they seem better placed in part I of the draft articles, which sets out general principles. These rules are contained in draft articles 4, 5 and 6.

(2) Doubts may exist as to the competence of the successor State to grant its nationality to persons not residing on its territory. However, commentators very often concentrate only on a particular aspect of the problem. Thus, e.g., it has been stated that, "in cases of universal succession, non-resident citizens of the State extinguished may, by the better view, escape acquisition of the nationality of the successor State by remaining abroad."[113] It appears that at least two conclusions may be drawn in this respect: first, a successor State does not have the obligation to grant its nationality to the persons concerned who would otherwise satisfy all criteria required for acquiring its nationality but who have their habitual residence in a third State and also have the nationality of a third State; second, a successor State cannot grant its nationality to persons who would otherwise be entitled to acquire its nationality but who have their habitual residence in a third State and also have the nationality of that State against their will.[114]

(3) In its 1995 preliminary report,[115] the Working Group concluded that a successor State does not have the obligation to grant its nationality to the persons concerned who have their habitual residence in a third State and also have the nationality of a third State, but that it may do so with their consent (or, rather, it cannot do so against their will).[116] The Working Group stated this rule in relation to unification and dissolution respectively. It was seen as an exception to the basic premise concerning the granting of nationality in these specific cases of succession of States. The Working Group also considered this problem in relation to other types of succession of States, i.e., transfer of territory and separation, and concluded that this category of persons should retain the nationality of the predecessor State. Nevertheless, should the predecessor State withdraw its nationality from such persons for any reason (such as a treaty with the successor State), then the granting thereto of the nationality of the successor State would also be subject to these persons' will.

---

[113] Ian Brownlie, Principles of Public International Law, 4th ed. (Oxford, Clarendon Press, 1990), p. 558.

[114] For cases involving the granting of nationality to persons residing outside the territory affected by the succession of States, see O'Connell (1956), op. cit., pp. 251-258.

[115] Official Records of the General Assembly, Fiftieth Session, Supplement No. 10 (A/50/10), annex.

[116] Ibid., paras. 17 (b) and 20.

(4) In view of the above, the Special Rapporteur, when preparing the draft articles, arrived at the conclusion that, because of the general character of this rule - or rather exception, it would be best placed in part I.

(5) The first difference between the present draft article 4 and the language used by the Working Group consists in the replacement of the term "third State" by the term "another State". It is true that publicists, when referring to a "third" State, might have had in mind States other than the predecessor or another successor State (in the case of several successor States), but in the Special Rapporteur's view, there is no reason for not extending the application of the above rule even to the situation where the habitual residence of the person concerned is not in a "third State", but in another "State concerned". (The operation of this rule could, however, be suspended by a treaty between States concerned in relation to persons concerned who have their habitual residence in their respective territories, but not in relation to persons concerned residing in "third States".)

(6) Concerning the Working Group's conclusion that a successor State may, however, grant its nationality to the persons concerned referred to in paragraph 1 (i.e., those who have their residence in another State and have the nationality of that State) with their consent, the Special Rapporteur felt that this aspect should be treated in a separate provision whose scope of application could be broader than the premise of paragraph 1. Accordingly, paragraph 2 sets out a rule providing that the successor State, when granting its nationality to persons habitually resident in another State, shall respect the will of such individuals. The limit for the application of this rule is the risk of statelessnes; in such event, respect for an individual's will should not be a mandatory requirement.

(7) The circle of persons covered by paragraph 1 and 2 differs: paragraph 2 includes, in addition to those persons covered by paragraph 1, persons who may be residents of one State (other than the successor State) and have the nationality of yet another State.

(8) Finally, confronted with the choice between two different phrases used by the Working Group to describe the expression of the person's will, i.e., "with their consent" or "against their will", the Special Rapporteur selected the latter. The former, which puts an accent on the individual's consent, could, in his view, create problems as to how such consent should be established, or, in other words, would put the burden of proof on the successor State. It would require the introduction of a presumption of consent in all cases where persons concerned would adopt a passive, indifferent attitude. The expression used in paragraph 2 does not create such a problem. It presupposes, nevertheless, that the person concerned must have, as a minimum, the possibility to refuse the nationality of the successor State (e.g., by means of a declaration of the "opting-out" kind).

/...

Article 5

Renunciation of the nationality of another State as a condition for granting nationality

When the person concerned entitled to acquire the nationality of a successor State has the nationality of another State concerned, the former State may make the acquisition of its nationality dependent on the renunciation by such person of the nationality of the latter State. However, such requirement shall not be applied in a manner which would result in rendering the person concerned stateless, even if only temporarily.

Commentary

(1) As in the case of draft article 4, the scope of the problem addressed in draft article 5 goes beyond State succession. Indeed, the renunciation of an applicant's present nationality is a rather common condition for naturalization set out in the legislation of many States. It is typical of legislations whose underlying philosophy is inimical to dual and multiple nationality. Such renunciation may result in temporary or, in the worst case, in lasting statelessness for the person concerned.

(2) The right of a successor State to require the renunciation of the nationality of another State as a condition for granting its nationality is generally accepted. The main concern voiced in different forums in this respect relates to the risk of statelessness which could result from such requirement. In the opinion of experts of the Council of Europe, "a State which gives an unconditional promise to grant its nationality is responsible at an international level for the de jure statelessness which arises from the release of a person from his or her previous nationality, on the basis of this promise."[117]

(3) The attempt to address, through the rule set out in article 5, the drawbacks of the above requirement is, however, limited to situations of State succession, as they alone are the object of the present exercise. The requirement of prior renunciation by a person of his or her current nationality, as a precondition for granting that person the nationality of the successor State, can be found in the legislation of some successor States, usually in relation to the optional acquisition of nationality. It may happen that such renunciation is required only with respect to the nationality of another State concerned (or rather another successor State), but not the nationality of a "third State".[118]

---

[117] Report of the Experts of the Council of Europe on the Citizenship Laws, op. cit., para. 56.

[118] See articles 6 and 18 of the Czech Law on Acquisition and Loss of Citizenship. (See also para. (31) of the commentary to draft articles 7 and 8.)

(4) It is not for the Commission to suggest which policy States should pursue on the matter of dual/multiple nationality. Accordingly, the draft articles must be neutral in this respect. The main concern of the Commission should be the risk of statelessness related to the requirement of prior renunciation by the person concerned of his or her current nationality, as a condition for the granting of the nationality of the successor State. Some national legislations containing this requirement have elaborated techniques which eliminate the risk of statelessness, including temporary statelessness. This demonstrates that the freedom of States in choosing their policy in matters of dual/multiple nationality and the general interest of avoiding statelessness can be reconciled.

(5) Article 5 is drafted with this goal in mind, while adapting the language to the needs of the present exercise, which is limited to situations of State succession. Accordingly, the article deals exclusively with the legislation of a successor State. Similarly, it deals only with the renunciation of the nationality of another State concerned.

(6) The first sentence of article 5 points to the freedom that each successor State has in deciding whether to make the acquisition of its nationality dependent upon the renunciation by a person concerned of the nationality of another State concerned. Such is the function of the word "may". The second sentence addresses the problem of statelessness. It does not prescribe a particular technique to be used. It just sets out a general requirement that the condition in question should not be applied in such a way as to render the person concerned stateless, even if only temporarily.

(7) It follows from the words "another State concerned" that the rule in article 5 applies in all situations of succession of States, except unification, where the successor State remains as the only "State concerned". Nevertheless, this is sufficient justification for the inclusion of this article in part I.

Article 6

Loss of nationality upon the voluntary acquisition of the nationality of another State

1. The predecessor State may provide in its legislation that persons who, in relation to the succession of States, voluntarily acquire the nationality of a successor State shall lose its nationality.

2. Each successor State may provide in its legislation that persons who, in relation to the succession of States, voluntarily acquire the nationality of another successor State or, as the case may be, retain the nationality of the predecessor State shall lose its nationality acquired in relation to such succession of States or the entitlement thereto.

Commentary

(1) The loss of a State's nationality upon the voluntary acquisition of the nationality of another State is a routine provision in the legislation of States pursuing a policy inimical to dual/multiple nationality.

(2) The Montevideo Convention on Nationality of 26 December 1936 stipulates that any naturalization (probably voluntary) of an individual in a signatory State carries with it the loss of the nationality of origin.[119]

(3) Article 20 of the Law on Citizenship of the Republic of Belarus of 18 October 1991 provided:

> "The citizenship of the Republic of Belarus will be lost ... upon acquisition, by the person concerned, of the citizenship of another State, unless otherwise provided by a treaty binding upon the Republic of Belarus ... The loss of citizenship becomes effective at the moment of the registration of the relevant fact by the competent authorities ..."[120]

(4) Likewise, in accordance with the 1963 Convention on Reduction of Cases of Multiple Nationality and Military Obligations in Cases of Multiple Nationality, concluded within the framework of the Council of Europe, persons who of their own free will acquire another nationality, by means of naturalization, option or recovery, lose their former nationality.[121] It is also to be found in legislations adopted in relation to a succession of States.

(5) As in the case of the preceding article, article 6 contains a provision which derives from a rule of a more general application which has been adapted to situations of State succession. Article 6 also applies in all types of succession of States, except unification, where the successor State remains as the only "State concerned".

(6) While draft articles 4 and 5 set out limitations to any freedom that the successor State might have in granting its nationality, a freedom which may substantially vary depending on the type of State succession, draft article 6 provides for a general entitlement of any successor or predecessor State, as the case may be, to withdraw its nationality from (or to refuse to grant its nationality to) persons concerned who, in relation to the succession of States, voluntarily acquired the nationality of another State concerned.

(7) The rights of the predecessor State (paragraph 1) and that of the successor State (paragraph 2) are spelled out separately just because of the difficulties involved in drafting a single paragraph on the matter. Paragraph 1 applies in all situations of succession of States, except unification and dissolution, where the predecessor State disappears. While it is true that the

---

[119] Article 1. Laws on nationality, op. cit., p. 585.

[120] See the materials submitted by Belarus.

[121] Article 1. United Nations Treaty Series, vol. 634, p. 224.

acquisition of the nationality of any other State may be the reason for the loss of the predecessor's nationality, paragraph 1 only refers to the case of the acquisition of the nationality of a successor State, because all other cases are beyond the scope of the present topic.

(8) Paragraph 2 focuses on the legislation of the successor State. Here, depending on the type of State succession, the assumption is the voluntary acquisition of the nationality of another successor State (in the case of dissolution) or the voluntary retention of the nationality of the predecessor State (in the case of separation or transfer of part of the territory) or even both (in the event of the creation of several successor States by separation of parts of territory from a predecessor State which continues to exist).

(9) The draft article does not address the question as to when the loss of nationality or of the entitlement thereto should become effective. As it is for the State concerned itself to decide on the main question, i.e., whether at all to withdraw its nationality from a person upon the voluntary acquisition of the nationality of another State, it is also for that State to determine when such withdrawal becomes effective. This may occur upon the acquisition of the nationality of another State or later, e.g., after a person concerned has effectively transferred his or her habitual residence outside the territory of the State whose nationality he or she has lost. In any event, such loss of nationality shall not precede the acquisition of the other State's nationality.

Article 7

The right of option

1. Without prejudice to their policy in the matter of multiple nationality, the States concerned should give consideration to the will of a person concerned whenever that person is equally qualified, either in whole or in part, to acquire the nationality of two or several States concerned.

2. Any treaty between States concerned or, as the case may be, the legislation of a State concerned should provide for the right of option for the nationality of that State by any person concerned who has a genuine link with that State if the person would otherwise become stateless as a consequence of the succession of States.

3. There should be a reasonable time limit for the exercise of any right of option.

Article 8

Granting and withdrawal of nationality upon option

1. When persons entitled to the right of option have exercised such right, the State whose nationality such persons have opted for shall grant them its nationality.

/...

2. When persons entitled to the right of option in accordance with these draft articles have exercised such right, the State whose nationality such persons have renounced shall withdraw its nationality from them, unless they would thereby become stateless.

3. Without prejudice to any obligation deriving from a treaty in force between States concerned, the State concerned other than the State whose nationality the persons concerned have opted for does not have the obligation to withdraw its nationality from them on the basis of the mere fact that they have opted for the nationality of the latter State, unless those persons have clearly expressed their will to renounce its nationality. This State may, nevertheless, withdraw its nationality from such persons when their acquiescence to the loss of its nationality may be presumed in the light of legislation in force on the date of the option.

Commentary

(1) The function which contemporary international law attributes to the will of individuals in the resolution of problems concerning nationality in cases of State succession is among the issues on which views considerably diverge. There is a substantial body of doctrinal opinion according to which the successor State is entitled to extend its nationality to those individuals susceptible of acquiring such nationality by virtue of the change of sovereignty, irrespective of the wishes of those individuals.[122]

(2) On the other hand, several commentators stress the role which contemporary international law attributes to the will of the individual in matters of acquisition and loss of nationality, which is best manifested through the recognition of the right of option. According to Charles Rousseau, in order to mitigate the problems arising in the sphere of nationality as a result of territorial changes, international law provides for both a collective institution (the plebiscite) and an individual institution (the right of option).[123] Nevertheless, it has also been stated that the exercise of an option "does not necessarily consist of an express declaration by a person in favour of one of the nationalities which he can elect ... A number of bilateral treaties, even in the distant past, provided that silence - sometimes associated with a person's residence in a territory that has undergone a change of

---

[122] O'Connell (1956), op. cit., p. 250.

[123] Charles Rousseau, Droit international public, tenth edition, Paris, Dalloz, 1984, p. 169 et seq.

/...

sovereignty - was to be considered as proof of the renunciation of primitive allegiance and of an option for the nationality of the successor State."[124]

(3) According to a statement attributed to Talleyrand at the Congress of Vienna in 1815, "people should not be treated like 'estate owned cattle', and shifted with the land where they themselves and their ancestors have lived for centuries, from one State to another without being asked for their consent or opinion."[125]

(4) The Commission therefore considered that the role of an individual's will in matters of nationality and, in particular, the concept of the right of option under contemporary international law in the case of a succession of States should be further clarified on the basis of State practice.[126]

(5) Numerous treaties regulating questions of nationality in connection with the succession of States as well as relevant national laws have provided for the right of option or for a similar procedure enabling individuals concerned to establish their nationality by choosing either between the nationality of the predecessor and that of the successor States or between the nationalities of two or more successor States.

(6) This was, for example, the case with the Treaty of Peace, Friendship, Limits and Settlement between Mexico and the United States of America of 2 February 1848, or the Treaty on the Delimitation of the Frontier between Mexico and Guatemala, of 27 September 1882.[127]

(7) The Treaty of Peace between the Allied and Associated Powers and Germany signed at Versailles on 28 June 1919 provided in numerous articles for a right of option, mainly as a means to correct the effects of its other provisions on the automatic acquisition of the nationality of the successor State and loss of the nationality of the predecessor State by persons habitually resident in the territories involved in the succession of States.

(8) Thus, in relation to the cession of certain territories by Germany to Belgium, article 37 of the Treaty of Versailles provided that "[w]ithin the two years following the definitive transfer of the sovereignty over the territories

---

[124] Rezek, op. cit., p. 378. The author refers to article 8 of the Treaty of Peace, Friendship, Limits and Settlement of 30 May 1848 between the United States and Mexico and article 8 of the Preliminary Convention of Peace of 27 August 1828 between Brazil and the United Provinces of the River Plate concerning the independence of Uruguay.

[125] Cited in Marek St. Korowicz, Introduction to International Law (The Hague, Martinus Nijhoff, 1959), p. 283.

[126] Official Records of the General Assembly, Fiftieth Session, Supplement No. 10 (A/50/10), para. 192.

[127] See the materials submitted by Mexico. See also para. (8) of the commentary to draft article 17.

assigned to Belgium ... German nationals over 18 years of age habitually resident in those territories will be entitled to opt for German nationality ..."[128]

(9) With regard to Alsace-Lorraine, paragraph 2 of the annex relating to article 79 of the Treaty of Versailles enumerated several categories of persons entitled to claim French nationality, in particular, persons not restored to French nationality under other provisions of the annex whose ascendants included a Frenchman or Frenchwoman, persons born or domiciled in Alsace-Lorraine, including Germans, or foreigners who acquired the status of citizens of Alsace-Lorraine.[129]

(10) Article 91 of the Treaty of Versailles established a right of option for German nationals habitually resident in territories recognized as forming part of Poland who acquired Polish nationality ipso facto and for Poles who were German nationals habitually resident in Germany or in a third country.[130]

(11) Concerning the new Czecho-Slovak State, article 85 of the Treaty of Versailles provided for the right of option for German nationals habitually resident both in the ceded territories or in any other territories forming part of the Czecho-Slovak State which seceded from the Austro-Hungarian Monarchy.

---

[128] Materials on succession of States, op. cit., p. 20.

[129] It reserved, at the same time, the right for French authorities, in individual cases, to reject the claim to French nationality. Accordingly, the procedure did not exactly correspond to the traditional notion of the right of option. Ibid., p. 27.

[130] Article 91 read as follows:

> "...
>
> "Within a period of two years after the coming into force of the present Treaty, German nationals over 18 years of age habitually resident in any of the territories recognized as forming part of Poland will be entitled to opt for German nationality.
>
> "Poles who are German nationals over 18 years of age and habitually resident in Germany will have a similar right to opt for Polish nationality.
>
> "...
>
> "Within the same period Poles who are German nationals and are in a foreign country will be entitled, in the absence of any provisions to the contrary in the foreign law, and if they have not acquired the foreign nationality, to obtain Polish nationality and to lose their German nationality by complying with the requirements laid down by the Polish State." Ibid., pp. 30-31.

Moreover, Czecho-Slovaks who were nationals of Germany had a similar right to opt for Czecho-Slovak nationality.[131]

(12) In relation to the restoration to Denmark of the sovereignty over the territory of Schleswig subjected to the plebiscite, article 113 of the Treaty provided for the right of option for any person over 18 years of age, whether habitually resident in the territory restored to Denmark or not habitually resident in such territory but born therein and of German nationality. The right of option was provided for two years from the date on which the sovereignty over the territory concerned was restored to Denmark.[132]

(13) According to article 106 of the Treaty of Versailles, relating to the Free City of Danzig, German nationals over 18 years of age ordinarily resident in the territory concerned, to whom the provisions of article 105 on automatic loss of German nationality and acquisition of the nationality of the Free City of Danzig applied, had the right to opt, within a period of two years, for German nationality.[133]

(14) The Treaty of Peace between the Allied and Associated Powers and Austria signed at Saint-Germain-en-Laye on 10 September 1919 also contained several provisions on the right of option. Article 78 provided that persons over 18 years of age losing their Austrian nationality and obtaining *ipso facto* a new nationality under article 70 were entitled within a period of one year from the entry into force of the Treaty to opt for the nationality of the State in which they possessed rights of citizenship before acquiring such rights in the territory transferred.[134]

(15) According to article 79 of the same Treaty, persons entitled to vote in plebiscites provided for in the Treaty had the right, within a period of six months after the definitive attribution of the area in which the plebiscite had taken place, to opt for the nationality of the State to which the area was not assigned.[135]

(16) Finally, article 80 of the same Treaty provided for the right of option for persons possessing rights of citizenship in territory forming part of the former Austro-Hungarian Monarchy, and differing in race and language from the majority of the population of such territory. They had the right to opt, within six months from the entry into force of the Treaty, for Austria, Italy, Poland, Romania, the Serb-Croat-Slovene State or the Czecho-Slovak State, if

---

[131] Ibid., pp. 28-29.

[132] Ibid., p. 32.

[133] Ibid., p. 489.

[134] Ibid., p. 497.

[135] Ibid.

they were of the same race and language as the majority of the population of the State selected.[136]

(17) Article 64 of the Treaty of Peace between the Allied and Associated Powers and Hungary, signed at Trianon on 4 June 1920, established a right of option in the context of the dissolution of a State and in situations which could be described as separation of part of a territory (secession). The article reads as follows:

> "Persons possessing rights of citizenship in territory forming part of the former Austro-Hungarian Monarchy, and differing in race and language from the majority of the population of such territory, shall within six months from the coming into force of the present Treaty severally be entitled to opt for Austria, Hungary, Italy, Poland, Roumania, the Serb-Croat-Slovene State, or the Czecho-Slovak State, if the majority of the population of the State selected is of the same race and language as the person exercising the right of option. The provisions of Article 63[137] as to the exercise of the right of option shall apply to the right of option given by this article."[138]

(18) In consonance with the provisions of the above Peace Treaties, clauses on the right of option were also included in treaties concerning the recognition of successor States. Thus, the Treaty between the Allied and Associated Powers and Poland signed at Versailles on 28 June 1919 established the right of option in its articles 3 and 4.[139] Analogous provisions were also contained in articles 3 and 4 of the Treaty of Saint-Germain-en-Laye between the Allied and Associated Powers and Czechoslovakia,[140] articles 3 and 4 of the Treaty of Saint-Germain-en-Laye between the Allied and Associated Powers and the Serb-Croat-Slovene State,[141] both of 10 September 1919, as well as articles 3 and 4 of the Treaty of Paris between the Allied and Associated Powers and Romania of 9 December 1919.[142]

---

[136] Ibid., pp. 497-498.

[137] Article 63 is analogous to article 78 of the Treaty of Peace between the Allied and Associated Powers and Austria signed at Saint-Germain-en-Laye (see para. (14) of this commentary).

[138] G. F. de Martens, Nouveau recueil général de traités, third edition, vol. XII, pp. 440-441 (for English text, see British and Foreign State Papers, vol. 113, p. 515).

[139] Ibid., vol. XIII, p. 505.

[140] Ibid., pp. 514-515.

[141] Ibid., p. 524.

[142] Ibid., p. 531.

(19) The Treaty of Peace between the Allied and Associated Powers and Bulgaria signed at Neuilly-sur-Seine on 27 November 1919 provided for the right of option in articles 40 and 45,[143] drafted along the same lines as articles 85 and 37 of the Treaty of Versailles.

(20) When Russia ceded to Finland the area of Petsamo, by the Peace Treaty of Tartu of 11 December 1920, the inhabitants of that territory were granted the right of option. Article 9 of the Treaty, which stipulated that Russian citizens domiciled in the ceded territory would automatically become Finnish citizens, also provided that those who had attained the age of 18 years could, during the year following the entry into force of the Treaty, opt for Russian nationality.[144]

---

[143] Article 40 read:

"Within a period of two years from the coming into force of the present Treaty, Bulgarian nationals over 18 years of age and habitually resident in the territories which are assigned to the Serb-Croat-Slovene State in accordance with the present Treaty will be entitled to opt for their former nationality. Serb-Croat-Slovenes over 18 years of age who are Bulgarian nationals and habitually resident in Bulgaria will have a similar right to opt for Serb-Croat-Slovene nationality ...

"Persons who have exercised the above right to opt must, within the succeeding twelve months, transfer their place of residence to the State for which they have opted ...

"Within the same period Serb-Croat-Slovenes who are Bulgarian nationals and are in a foreign country will be entitled, in the absence of any provisions to the contrary in the foreign law, and if they have not acquired the foreign nationality, to obtain Serb-Croat-Slovene nationality and lose their Bulgarian nationality by complying with the requirements laid down by the Serb-Croat-Slovene State."

Article 45 stipulated that:

"Within a period of two years from the coming into force of the present Treaty, Bulgarian nationals over 18 years of age and habitually resident in the territories assigned to Greece in accordance with the present Treaty will be entitled to opt for Bulgarian nationality ...

"Persons who have exercised the above right to opt must, within the succeeding twelve months, transfer their place of residence to the State for which they have opted ..."

Materials on succession of States, op. cit., pp. 38-39.

[144] See the materials submitted by Finland.

(21) The Treaty of Lausanne of 1923 guaranteed the right of option for a period of two years from its entry into force to Turkish nationals habitually resident in the island of Cyprus;[145] Turkey had declared that it recognized the annexation of Cyprus by the British Government. The Treaty also included provisions on the right of option of Turkish subjects habitually resident in the territories detached from Turkey under that Treaty or natives of those territories who were habitually resident abroad.[146]

---

[145] Article 21 read as follows:

> "Turkish nationals ordinarily resident in Cyprus on the 5th November, 1914, will acquire British nationality subject to the conditions laid down in the local law, and will thereupon lose their Turkish nationality. They will, however, have the right to opt for Turkish nationality within two years from the coming into force of the present Treaty, provided that they leave Cyprus within twelve months after having so opted ..."

Materials on succession of States, op. cit., p. 46.

[146] Articles 31 to 34 read as follows:

> "Article 31. Persons over eighteen years of age, losing their Turkish nationality and obtaining ipso facto a new nationality under article 30, shall be entitled within a period of two years from the coming into force of the present Treaty to opt for Turkish nationality.
>
> "Article 32. Persons over eighteen years of age, habitually resident in territory detached from Turkey in accordance with the present Treaty, and differing in race from the majority of the population of such territory, shall, within two years from the coming into force of the present Treaty, be entitled to opt for the nationality of one of the States in which the majority of the population is of the same race as the person exercising the right to opt, subject to the consent of that State.
>
> "Article 33. Persons who have exercised the right to opt in accordance with the provisions of articles 31 and 32 must, within the succeeding twelve months, transfer their place of residence to the State for which they have opted.
>
> "They will be entitled to retain their immovable property in the territory of the other State where they had their place of residence before exercising their right to opt.
>
> "They may carry with them their movable property of every description. No export or import duties may be imposed upon them in connection with the removal of such property.
>
> "Article 34. Subject to any agreements which it may be necessary to conclude between the Governments exercising authority in the countries detached from Turkey and the Governments of the countries where the persons concerned are resident, Turkish nationals over eighteen years of age who

(22) The Treaty of Peace between the Allied and Associated Powers and Italy of 10 February 1947 envisaged that persons domiciled in territory transferred by Italy to other States and whose customary language was Italian would have a right of option.[147]

(23) Among the documents concerning nationality issues in relation to decolonization, while some contained provisions on the right of option, several did not. Thus, the Burma Independence Act, after having envisaged that the categories of persons specified in the First Schedule to that Act automatically lost British nationality,[148] also provided, in section 2, subsection (2), that any such person who was immediately before independence domiciled or ordinarily

---

are natives of a territory detached from Turkey under the present Treaty, and who on its coming into force are habitually resident abroad, may opt for the nationality of the territory of which they are natives, if they belong by race to the majority of the population of that territory, and subject to the consent of the Government exercising authority therein. This right of option must be exercised within two years from the coming into force of the present Treaty." Ibid., pp. 46-47.

[147] Article 19 read as follows:

"...

"2. The Government of the State to which the territory is transferred shall, by appropriate legislation within three months from the coming into force of the present Treaty, provide that all [Italian citizens domiciled on 10 June 1949 in territory transferred by Italy to another State, and their children born after that date,] over the age of eighteen years (or [such married citizens] whether under or over that age) whose customary language is Italian, shall be entitled to opt for Italian citizenship within a period of one year from the coming into force of the present Treaty. Any person so opting shall retain Italian citizenship and shall not be considered to have acquired the citizenship of the State to which the territory is transferred. The option of the husband shall not constitute an option on the part of the wife. Option on the part of the father, or, if the father is not alive, on the part of the mother, shall however automatically include all unmarried children under the age of eighteen years.

"3. The State to which the territory is transferred may require those who take advantage of the option to move to Italy within a year from the date when the option was exercised."

At the same time, article 20 provided that Italian citizens whose customary language was one of the Yugoslav languages and who were domiciled in Italy could acquire Yugoslav nationality upon request. This provision covered a category of persons whose nationality was not affected by State succession and is therefore outside the scope of the Commission's study. Ibid., p. 59.

[148] See para. (5) of the commentary to draft article 24 below.

/...

resident in any place outside Burma in which the British Monarch had jurisdiction over British subjects could, by a declaration made before the expiration of two years after independence, elect to remain a British subject. In that case, the provisions regarding loss of British nationality would be deemed never to have applied to or in relation to such person or, except so far as the declaration otherwise provided, any child of his who was under the age of 18 years at the date of the declaration.[149] The Act also provided for a right of option for the purpose of avoiding statelessness. Indeed, any person, other than a person mentioned in section 2, subsection (2), who ceased to be a British subject under the Act and upon independence neither became, nor became qualified to become, a citizen of the independent country of Burma had the like right of election as provided for by subsection (2) of section 2.[150]

(24) Articles III and IV of the Treaty of Cession of the Territory of the Free Town of Chandernagore between India and France, of 2 February 1951, also provide an example of the "opting out" concept. Thus, French subjects and citizens of the French Union who were domiciled in the transferred territory and acquired ipso facto Indian nationality under the Treaty[151] could, according to article III, by a written declaration made within six months following the entry into force of the Treaty, opt for the retention of their nationality.[152]

(25) In article 4 of the Agreement between India and France for the Settlement of the Question of the Future of the French Establishments in India, signed at New Delhi on 21 October 1954, both Governments agreed that questions pertaining to citizenship were to be determined before de jure transfer took place and that free choice of nationality would be allowed.[153]

(26) The Treaty of Cession of the French Establishments of Pondicherry, Karikal, Mahe and Yanam, between India and France, signed at New Delhi on 28 May 1956, also contained provisions on the right of option for French

---

[149] Materials on succession of States, op. cit., p. 145.

[150] Section 2, subsection (3). For the remaining provisions of section 2 on the right of option and its consequences, see also subsections (4) and (6); ibid., p. 146.

[151] See article II of the Treaty, ibid., p. 77.

[152] Ibid. Article IV of the Treaty read:

> "Persons who will have opted for the retention of their nationality in accordance with the provisions of article III of this Treaty and who desire to permanently reside or establish themselves in any French territory outside the Free Town of Chandernagore shall, on application to the Government of the Republic of India, be permitted to transfer or remove such or all of their assets and property as they may desire and as may be standing in their names on the date of the coming into force of this Treaty." Ibid., pp. 77-78.

[153] Ibid., p. 80.

nationals who were otherwise to acquire automatically Indian nationality by virtue of articles 4 and 6 of the Treaty as well as for French nationals who were otherwise, under article 7, to retain their French nationality.[154]

(27) Several articles of the Convention on Nationality between France and Viet Nam, signed at Saigon on 16 August 1955, established a right of option.[155] Only some were of relevance to the situation of State succession. Thus, in accordance with article 4, persons of Viet Nam origin more than 18 years of age at the date of coming into operation of the Convention and who had acquired French nationality prior to 8 March 1949 either by individual or collective administrative measure or by judicial decision were to retain French nationality with the right to opt for Viet Nam nationality. The same provisions were applicable to persons of Viet Nam origin who, prior to the coming into operation of the Convention, acquired French nationality in France under the rules of common law applicable to aliens. Finally, persons of Viet Nam origin above the age of 18 at the date of coming into operation of the Convention who had acquired French citizenship after 8 March 1949 were to acquire Viet Nam nationality with the right to opt for French nationality.[156]

(28) Article 3 of the Treaty between Spain and Morocco of 4 January 1969 regarding Spain's retrocession to Morocco of the Territory of Ifni provided that, with the exception of those persons who had acquired Spanish nationality by one of the means of acquisition laid down in the Spanish Civil Code and,

---

[154] Article 5 of the Treaty provided that French nationals born in the territory of the Establishments and domiciled therein could, "by means of a written declaration drawn up within six months of the entry into force of the Treaty of Cession, choose to retain their nationality. Persons availing themselves of this right shall be deemed never to have acquired Indian nationality."

Article 6 provided, inter alia, that French nationals born in the territory of the Establishments and domiciled in the territory of the Indian Union and their children "shall be entitled to choose as indicated in article 5 above ..."

Finally, article 8 provided that French nationals born in the territory of the Establishments and domiciled in a country other than the territory of the Indian Union that were otherwise to retain French nationality could, "by means of a written declaration signed in the presence of the competent Indian authorities within six months of the entry into force of the Treaty of Cession, choose to acquire Indian nationality. Persons availing themselves of this right shall be deemed to have lost French nationality as from the date of the entry into force of the Treaty of Cession." Ibid., p. 87.

[155] Ibid., pp. 446-450.

[156] Other articles established a right of option for other categories of persons. This right had to be exercised, in general, within six months after the date of the coming into operation of the Convention, except in the case of minor children, where the time limit began to run from the date on which the infant child attained the age of 18 (see article 15, ibid., p. 449).

accordingly, were to retain it in any case, all persons born in the Territory who had Spanish nationality up to the date of the cession could opt for that nationality by making a declaration of option to the competent Spanish authorities within three months from that date.[157]

(29) In recent cases of State succession in Eastern and Central Europe, where questions of nationality were not resolved by treaty but solely through the national legislation of the States concerned, the possibility of choice, to the extent permitted by internal law, was in fact established simultaneously in the legal orders of at least two States. The prospect of acquiring nationality by optional declaration on the basis of the legislation of one of the States concerned can be realistically evaluated only in conjunction with the laws of the other State relating to renunciation of nationality, release from the nationality bond or loss of nationality. The real impact of the legislation of a successor State regarding optional acquisition of its nationality may also depend largely upon the legislation of the States concerned concerning dual nationality.

(30) The Law on the Citizenship of the Slovak Republic contained liberal provisions on the optional acquisition of nationality. According to article 3, paragraph 1, every individual who was on 31 December 1992 a citizen of the Czech and Slovak Federal Republic and did not acquire the citizenship of Slovakia ipso facto, had the right to opt for the citizenship of Slovakia.[158] No other requirement, such as permanent residence in the territory of Slovakia, was

---

[157] See the materials submitted by Spain.

[158] See the materials submitted by Slovakia. Paragraphs 2 and 3 of article 3 further stipulated that:

> "(2) Options pursuant to paragraph 1 may be done until 1 December 1993 in form of [a] written declaration submitted to a district authority in the territory of the Slovak Republic or to a diplomatic or consular mission of the Slovak Republic abroad, depending on the place of residence of the individual exercising the option. Married couples may file a joint declaration.
>
> "(3) Declarations pursuant to paragraph 2 above must show:
>
> "(a) The identity of the individual filing the declaration,
>
> "(b) The fact that the individual filing the declaration had been, on 31 December 1992, a citizen of the Czech and Slovak Federal Republic,
>
> "(c) The place of birth and residence on 31 December 1992."

imposed for the optional acquisition of the citizenship of Slovakia by former Czechoslovak citizens.[159]

(31) The Czech Law on Acquisition and Loss of Citizenship envisaged, in addition to provisions on ex lege acquisition of Czech nationality, that such nationality could be acquired on the basis of a declaration. According to article 6, a natural person who was on 31 December 1992 a citizen of the Czech and Slovak Federal Republic but not a citizen of the Czech Republic or the Slovak Republic could opt for citizenship of the Czech Republic by making a declaration to that end.[160] While article 6 was addressed to a relatively small number of individuals - there were very few Czechoslovak nationals who did not have at the same time either Czech or Slovak "secondary" nationality - article 18, which also provided for a right of option, was addressed to a much larger group, but subjected such right to a number of requirements.[161]

---

[159] Although the Slovak Law did not subject the optional acquisition of the Slovak nationality to the requirement of the loss of the other nationality of the individual concerned, according to article 17 of the Czech Law on Acquisition and Loss of Citizenship (No. 40/1993 Col. of Laws), Czech nationals who made an optional declaration pursuant to article 3 of the Slovak Law were deemed to have automatically lost their Czech nationality when they acquired Slovak nationality (see the materials submitted by the Czech Republic). This may not be obvious from the wording of article 17 alone, which attaches the loss of Czech nationality to the acquisition of the nationality of another State "upon the individual's own request".

[160] See the materials submitted by the Czech Republic.

[161] The article read as follows:

> "(1) The citizen of the Slovak Republic may opt for the citizenship of the Czech Republic by a declaration made on 31 December 1993 at the latest, provided that:
>
> "(a) He has an uninterrupted permanent residence on the territory of the Czech Republic for the period of at least two years;
>
> "(b) He will submit a certificate confirming the release from the citizenship of the Slovak Republic, except when he will prove that he had applied for the release and his application was not processed within three months and, at the same time, he makes a declaration before the district authority that he renounces the citizenship of the Slovak Republic. This documentation will not be required if the option for the citizenship of the Czech Republic results in the loss of the citizenship of the Slovak Republic;
>
> "(c) He has not been sentenced during the last five years on charges of intentional offence.
>
> "..."

The possibility of option was also open to the citizens of Slovakia permanently residing in a third country, provided that their last permanent residence before

(32) The right of option was quite recently envisaged also by the Arbitration Commission of the Peace Conference on Yugoslavia.[162] Although the Arbitration Commission might not necessarily have had in mind exactly the same issue as that of the "right of option" discussed in the first report of the Special Rapporteur and in the report of the Working Group, its Opinion undoubtedly has some relevance for the question of nationality discussed by the International Law Commission.[163]

(33) As to its legal basis, for the majority of publicists, the right of option can be deduced only from a treaty. Certain authors, however, tend to assert the existence of an independent right of option as an attribute of the principle of self-determination.[164] Some members of the Commission felt that, while the granting of such a right was desirable, the notion did not necessarily reflect lex lata and pertained to the progressive development of international law.[165] Similarly, the debate in the Sixth Committee revealed a considerable uncertainty about the existence, under general international law, of a right of option in the context of State succession. While in the view of some

---

leaving for abroad was on the territory of the Czech Republic or that at least one of their parents was a citizen of the Czech Republic. In such case, the condition under (b) above also applied, but not the condition under (c).

[162] The Commission recalled that, by virtue of the right to self-determination, "every individual may choose to belong to whatever ethnic, religious or language community he or she wishes. In the Commission's view, one possible consequence of this principle might be for the members of the Serbian population in Bosnia and Herzegovina and Croatia to be recognized under agreements between the Republics as having the nationality of their choice, with all the rights and obligations which that entails with respect to the States concerned." Opinion No. 2 of 11 January 1992, International Legal Materials, vol. XXXI (1992), p. 1498. For comments on this aspect of Opinion No. 2, see Alain Pellet, "Note sur la Commission d'arbitrage de la Conférence européenne pour la paix en Yougoslavie", Annuaire français de droit international, vol. XXXVII (1991), pp. 340-341.

[163] For different interpretations of Opinion No. 2, see the Mikulka-Pellet discussion in Vera Gowlland-Debbas (ed.), The Problem of Refugees in the Light of Contemporary International Law Issues (Dordrecht and Boston, Nijhoff, 1996), pp. 47-48 and 56-57.

[164] See Joseph L. Kunz, "L'option de nationalité", Recueil des cours de l'Académie de droit international de La Haye, vol. 31 (1930-I), pp. 109-172; "Nationality and Option Clauses in the Italian Peace Treaty of 1947", American Journal of International Law, vol. 41 (1947), pp. 622-631.

[165] Official Records of the General Assembly, Fiftieth Session, Supplement No. 10 (A/50/10), para. 213.

representatives contemporary international law recognized such a right,[166] according to others, the concept belonged to the realm of progressive development of international law.[167]

(34) Views also differed as to the policy that the Commission should follow in this field. Some members observed that there could be no unrestricted free choice of nationality.[168] Emphasis was also placed on the need not to reverse the roles: for, it was said, State succession was a matter for States and, notwithstanding legitimate human rights concerns, it was questionable whether the will of individuals could or should prevail in all cases over agreements between States as long as such agreements fulfilled a number of requirements.[169]

(35) Other members, however, took the view that the right of option was anchored in the structure of international law and should, in the context of State succession, be considered as a fundamental human right. It was also believed that the State should exercise its right to determine nationality in the interest of nation-building judiciously, bearing in mind, for instance, the principle of the unity of the family.[170] The view was also expressed that the factors which would indicate a choice was bona fide should be identified and that the State should respect and give effect to them by granting its nationality.[171]

(36) In the view of the Working Group, since the expression of the will of the individual was a consideration which, with the development of human rights law, had become paramount, States should not be able, as in the past, to grant their nationality, even by agreement inter se, against an individual's will.[172] Of course, these conclusions of the Working Group apply only to certain categories of persons whose nationality is affected by a succession of States, as defined in its report.[173] In theory, individuals for whom a right of option has been envisaged are the following: on the one hand, in the case of secession and transfer of part of a territory, persons falling within a "grey area" of

---

[166] See the statements by the delegation of the Republic of Korea (A/C.6/50/SR.24, para. 90, and A/C.6/51/SR.41, para. 52).

[167] See the statements by the delegations of the Islamic Republic of Iran (A/C.6/50/SR.23, para. 51) and Slovenia (A/C.6/51/SR.38, para. 13).

[168] Official Records of the General Assembly, Fiftieth Session, Supplement No. 10 (A/50/10), para. 192.

[169] Ibid., para. 214.

[170] Ibid., para. 215.

[171] Ibid., para. 192.

[172] Ibid., annex, para. 23.

[173] Ibid., para. 224.

overlap between the categories of individuals from whom the predecessor State has an obligation not to withdraw its nationality and the categories to whom the successor State has an obligation to grant its nationality; on the other hand, in the case of dissolution, persons to whom no successor State in particular is required to grant its nationality.[174]

(37) The Working Group also stressed that the right of option should be an effective right and that the States concerned should therefore have the obligation to provide individuals concerned with all relevant information on the consequences of the exercise of a particular option, including in areas relating to the right of residence and social security benefits, so that those persons would be able to make an informed choice.[175]

(38) Within the Commission, the view was expressed that a reasonable time limit should be envisaged for the exercise of the right of option.[176] The study of State practice indicates that only in exceptional cases was the right of option granted for a considerable period of time during which affected individuals enjoyed a kind of dual nationality.[177]

(39) Paragraph 1 of article 7 sets out the requirement for respect of the will of the person concerned where the person is equally qualified, either in whole or in part, to acquire the nationality of two or several States concerned. This language conforms to the recommendation of the Working Group.[178] The introductory phrase indicates that this requirement applies irrespective of the policy that States concerned may pursue in the matter of dual/multiple nationality.

(40) Paragraph 2 highlights the function of the right of option as one of the techniques aimed at eliminating the risk of statelessness in situations of State succession. It draws its inspiration from such instruments as the Burma Independence Act.[179]

(41) Paragraph 3 stipulates the general requirement of a reasonable time limit for the exercise of the right of option, irrespective of whether it is

---

[174] For the definitions of the categories of individuals to whom the States concerned have an obligation to grant a right of option, see paras. 14 and 21 of the report of the Working Group (ibid., annex).

[175] Official Records of the General Assembly, Fiftieth Session, Supplement No. 10 (A/50/10), annex, para. 24.

[176] Ibid., para. 212.

[177] See the Evian Declaration (Algeria-France) of 19 March 1962, United Nations, Treaty Series, vol. 507, pp. 35 and 37.

[178] Official Records of the General Assembly, Fifty-first Session, Supplement No. 10 (A/51/10), para. 86 (d).

[179] See para. (23) of the present commentary.

provided in a treaty between States concerned or in the legislation of a State concerned. It follows from the above examples that the length of the period during which persons concerned were granted the right of option varied considerably. It would therefore not be wise to attempt to indicate a more precise time limit, other than to require that it be "reasonable". What constitutes a "reasonable" time limit may depend upon the circumstances of the succession of States, but also on the categories to which persons concerned belong. As stressed by the Working Group, what is most important is that the State allow for an "effective" right of option.

(42) Finally, the Special Rapporteur did not believe that it was necessary to include in article 7 an explicit provision requiring States concerned to provide persons concerned with all relevant information on the consequences of the exercise of a particular option, because this problem is already addressed in draft article 3, paragraph 1.

(43) Concerning the use of the term "option" in draft articles 7 and 8, and elsewhere in part II, it is worth recalling that the Working Group indicated in its report that it was using the term "option" in a broad sense, covering both the possibility of "opting in", i.e., making a positive choice, and the possibility of "opting out", i.e., renouncing a nationality acquired automatically.[180]

(44) Draft article 8 spells out the consequences of the exercise of the right of option by a person concerned. Most of its provisions are self-explanatory. Paragraph 1 highlights the logical consequence of the exercise of the right of option by persons so entitled under a treaty or under the legislation of the State concerned: the obligation of the State whose nationality such persons have opted for to grant them its nationality.

(45) Paragraph 2 sets out the obligation of the State concerned whose nationality persons entitled to exercise a right of option have renounced to withdraw its nationality therefrom. The limits of this obligation are established by the requirement not to create statelessness.

(46) The obligations of the States concerned referred to in paragraphs 1 and 2 may operate jointly, when the right of option is based on a treaty between those States, but also separately, when the right of option (in the form of both opting-in or opting-out) is granted solely by the legislation of the State concerned. The second situation is envisaged in paragraph 3. The first sentence emphasizes the autonomy of the legislations of the two States concerned, as it provides that the optional acquisition of the nationality of one State by a person concerned does not inevitably imply the obligation of the other to withdraw its nationality therefrom. Such obligation exists only if it is based on a treaty between the States concerned or if the person opting for the nationality of one State concerned also renounces the nationality of the other in accordance with the provisions of the latter's legislation.

---

[180] Official Records of the General Assembly, Fiftieth Session, Supplement No. 10 (A/50/10), annex, para. 23.

(47) The last sentence of paragraph 3 may be considered as superfluous, in the light of the more general provisions of paragraphs 1 and 2 of article 6 concerning the loss of nationality upon the voluntary acquisition of the nationality of another State. The Special Rapporteur, nevertheless, preferred to include this provision in the draft article concerning the right of option in order to provide in one place a comprehensive picture of the situation which can result from the exercise of such right.

Article 9

Unity of families

> Where the application of their internal law or of treaty provisions concerning the acquisition or loss of nationality in relation to the succession of States would impair the unity of a family, the States concerned shall adopt all reasonable measures to allow that family to remain together or to be reunited.

Commentary

(1) There are a number of examples from State practice, particularly in connection with the granting of a right of option, of provisions addressing the problem of the common destiny of families.

(2) Thus, article 37 of the Peace Treaty of Versailles providing for the right of Germans habitually resident in the territories ceded to Belgium to opt for German nationality,[181] stipulated, inter alia:

> "Option by a husband will cover his wife and option by parents will cover their children under 18 years of age."[182]

(3) The same provision was contained in article 85 of the Treaty concerning the right of option for Germans habitually resident in the territories ceded to the Czecho-Slovak State or in any other territories forming part of that State as well as for Czecho-Slovaks who were German nationals and were habitually resident in Germany;[183] in article 91 providing for the right of option for German nationals habitually resident in territories recognized as forming part of Poland and for Poles who were German nationals habitually resident in Germany or in a third country;[184] in article 106 relating to the Free City of Danzig concerning the right of German nationals ordinarily resident in

---

[181] See paragraph (8) of the commentary to draft articles 7 and 8 above.

[182] Materials on succession of States, op. cit., p. 20.

[183] Ibid., pp. 28-29.

[184] Ibid., pp. 30-31. See also paragraph (10) of the commentary to draft articles 7 and 8 above.

the territory concerned to opt for German nationality;[185] and in article 113 concerning the right of persons to opt for German or Danish nationality, in relation to the restoration of Denmark's sovereignty over the territory of Schleswig subjected to the plebiscite.[186]

(4) Concerning Alsace-Lorraine, paragraph 2 of the annex relating to article 79 of the Treaty of Versailles provided that certain categories of persons were entitled to claim French nationality,[187] including:

> "...
>
> "(6) The husband or wife of any person whose French nationality may have been restored under [preceding provisions], or who may have claimed and obtained French nationality in accordance with the preceding provisions."[188]

It was further stipulated that:

> "The legal representative of a minor may exercise, on behalf of that minor, the right to claim French nationality; and if that right has not been exercised, the minor may claim French nationality within the year following his majority."[189]

The true character of this "claim" can be determined in the light of the last sentence of paragraph 2, according to which French authorities reserved to themselves the right, in individual cases, to reject the claim to French nationality under the said paragraph except in the cases provided for in subparagraph 6.

(5) The Peace Treaty of Saint-Germain-en-Laye, which also envisaged a right of option (the main provision, article 78, being similar to article 37 of the Treaty of Versailles), provided, in its article 82, that the status of a married woman would be governed by that of her husband, and the status of children under 18 years of age by that of their parents.[190]

(6) Provisions to the effect that the option by the husband covered his wife and the option by parents covered their children under 18 years of age were also included in treaties concerning the recognition of successor States, namely

---

[185] Ibid., p. 489.

[186] Ibid., p. 32.

[187] See paragraph (9) of the commentary to draft articles 7 and 8 above.

[188] Materials on succession of States, op. cit., p. 27.

[189] Ibid.

[190] G. F. de Martens, Nouveau recueil général de traités, third series, vol. XI, p. 712.

respective articles 3 and 4 of the Treaty of Versailles with Poland,[191] the Treaty of Saint-Germain-en-Laye with Czechoslovakia[192], the Treaty of Saint-Germain-en-Laye with the Serb-Croat-Slovene State[193] and the Treaty of Paris with Romania.[194]

(7) The Peace Treaty of Neuilly-sur-Seine provided for the right of option in articles 40 and 45, which both contained similar language to the effect that the option by the husband covered his wife and option by parents covered their children under 18 years of age.[195]

(8) Article 9 of the Peace Treaty of Tartu of 11 December 1920 concerning the cession by Russia to Finland of the area of Petsamo, which granted the inhabitants of that territory the right of option, provided, inter alia, that:

> "A husband shall opt on behalf of his wife unless otherwise decided by agreement between them, and parents shall opt on behalf of those of their children who have not attained 18 years of age."[196]

(9) The Treaty of Lausanne of 1923 provided in its article 36 of section II entitled "Nationality" that:

> "For the purposes of the provisions of this Section, the status of a married woman will be governed by that of her husband, and the status of children under eighteen years of age by that of their parents."[197]

In practical terms, wives and minors followed the nationality of the husband and father respectively when he had acquired "ipso facto, in the conditions laid down by the local law" the nationality of the State to which the territory detached from Turkey had been transferred (article 30), when he had opted for Turkish nationality (article 31), or (in the case of a person habitually resident in territory detached from Turkey but differing in race from the majority of the population of such territory) when he had opted for the nationality of one of the States in which the majority of the population was of the same race as himself (article 32).[198]

---

[191] Ibid., vol. XIII, p. 505.

[192] Ibid., pp. 514-515.

[193] Ibid., p. 524.

[194] Ibid., p. 531.

[195] Materials on succession of States, op. cit., pp. 38-39.

[196] See the materials submitted by Finland.

[197] Materials on succession of States, op. cit., p. 47.

[198] Ibid., pp. 46-47.

/...

(10) The Treaty of Peace between the Allied and Associated Powers and Italy of 10 February 1947, which granted a right of option to persons domiciled in territory transferred by Italy to other States and whose customary language was Italian, stipulated:

> "The option of the husband shall not constitute an option on the part of the wife. Option on the part of the father, or, if the father is not alive, on the part of the mother, shall, however, automatically include all unmarried children under the age of eighteen years."[199]

(11) The Burma Independence Act (First Schedule) in its section 2, subsection (2), granted certain categories of persons the right to elect, by declaration, to remain British subjects.[200] In that case, the provisions regarding loss of British nationality were deemed never to have applied to or in relation to such person or, except so far as the declaration otherwise provided, any child of his who was under the age of 18 years at the date of the declaration.[201]

(12) The practice of several other States that emerged from the process of decolonization provides other examples of the concern for the preservation of a family's unity. Thus, under the Constitution of Barbados,[202] two types of acquisition of citizenship were envisaged in relation to accession to independence. Section 2 enumerated the categories of persons who automatically became citizens of Barbados on the day of its independence, 30 November 1966. Section 3 enumerated the categories of persons entitled to be registered as citizens upon making application, and provided, inter alia, that:

> "(1) Any woman who on 29 November 1966 is or has been married to a person:
>
> (a) Who becomes a citizen of Barbados by virtue of section 2; ...
>
> shall be entitled, upon making application, and, if she is a British protected person or an alien, upon taking the oath of allegiance, to be registered as a citizen of Barbados.
>
> "...
>
> "(3) Any woman who on 29 November 1966 is or has been married to a person who subsequently becomes a citizen of Barbados by registration under subsection (2) shall be entitled, upon making application, and if she is a British protected person or an alien,

---

[199] Article 19, ibid., p. 59.

[200] See paragraph (23) of the commentary to draft articles 7 and 8 above.

[201] Materials on succession of States, op. cit., p. 146.

[202] Ibid., p 124.

/...

upon taking the oath of allegiance, to be registered as a citizen of Barbados ..."[203]

(13) Similar provisions can be found in the Constitutions of a number of other States which acceded to independence after the Second World War, such as Botswana,[204] Guyana,[205] Jamaica,[206] Mauritius,[207] Sierra Leone[208] and Trinidad and Tobago.[209]

(14) The Constitution of Malawi contained, inter alia, detailed provisions on the acquisition of the citizenship of Malawi, upon application, by any woman married to a person who became a citizen of Malawi (section 2, subsection (4) and section 3). The list in section 2, subsection (2), of those persons considered as having a substantial Malawi connection included, inter alia, individuals who, as minor children, were registered as citizens of the former Federation by the responsible parent or were adopted by a citizen of the former Federation who was resident in the former Protectorate.[210]

(15) In addition to envisaging automatic acquisition of Cypriot citizenship, annex D to the Treaty concerning the Establishment of the Republic of Cyprus of 16 August 1960 provided for the acquisition of citizenship upon application, inter alia, by women who were married to persons who became or would have become citizens of the Republic of Cyprus or were entitled under different provisions to make an application for the citizenship of the Republic of Cyprus (section 6).[211]

(16) Such provisions, however, cannot be found in the Agreement between India and France for the Settlement of the Question of the Future of the French

---

[203] Ibid., pp. 124-125. The right to be registered as a citizen according to the provisions of subsections (2) and (3) was, nevertheless, subject to such exceptions or qualifications as might be prescribed in the interests of national security or public policy.

[204] Ibid., pp. 137-139.

[205] Ibid., pp. 203-204.

[206] Ibid., p. 246.

[207] Ibid., p. 353.

[208] Ibid., pp. 389-390.

[209] Ibid., p. 429.

[210] Ibid., pp. 307-308.

[211] Ibid., pp. 173-177.

Establishments in India, signed at New Delhi on 21 October 1954, which otherwise provided in its article 4 that "free choice of nationality shall be allowed."[212]

(17) The Treaty of Cession of the French Establishments of Pondicherry, Karikal, Mahe and Yanam, between India and France, signed at New Delhi on 28 May 1956, which also contained provisions on the right of option for French nationals who were otherwise to acquire automatically Indian nationality, stipulated:

> "French nationals born in the territory of the Establishments and domiciled in the territory of the Indian Union ... and their children shall be entitled to choose as indicated in article 5 above. They shall make this choice under the conditions and in the manner prescribed in the aforesaid article."[213]

(18) The Convention on Nationality between France and Viet Nam, signed at Saigon on 16 August 1955, established a right of option. Not all of its provisions, however, were related to State succession. According to article 7 of the Convention:

> "In the case of an optional declaration of Vietnamese nationality as provided for [in certain articles], the status of children under 18 years of age on the date of entry into force of this Convention shall be governed by that of their father, where filiation has been established in respect of

---

[212] Ibid., p. 80. The practical need for a provision ensuring the possibility of option for the same nationality by all members of a family, however, was not obvious in this case owing to the fact, that, in contrast to almost all of the above cases, the option for the retention of French nationality did not involve the obligation of the person concerned to move outside of the transferred territory. On the contrary, several provisions were aimed at facilitating their continued presence in this territory. Thus, according to article 5:

> "... French civil servants, magistrates and military personnel born in the Establishments or keeping there family links shall be permitted to return freely to the Establishments on leave or on retirement."

Article 7 further provided that:

> "Nationals of France and the French Union born in or domiciled in the Establishments on the date of the de facto transfer and at present practising their professions therein shall be permitted to carry on their professions in these Establishments without being required to secure additional qualifications, diplomas or permits, or to comply with any new formalities." Ibid., pp. 80-81.

[213] Article 6, ibid., p. 87. For the text of article 5, see note 154 above.

/...

> the father, and by that of their mother, where filiation has been established only in respect of the mother ..."[214]

(19) The concern for the preservation of a family's unity is also apparent in some provisions of the national legislation of the successor States that emerged from the recent dissolutions in Eastern and Central Europe, where questions of nationality were not resolved by treaty but solely through national legislation.

(20) Thus, the Czech Law on Acquisition and Loss of Citizenship envisaged that the nationality of the Czech Republic could also be acquired, under certain conditions, on the basis of an optional declaration made by former Czechoslovak nationals who, following the dissolution, became Slovak nationals (article 18). In this connection, the Law provided that:

> "(3) In the case that both parents become citizens of the Czech Republic according to the paragraphs above, their children under 15 years of age follow their citizenship of the Czech Republic; in the case that only one parent is alive, children follow his/her citizenship. Parents will include such children in their declaration ...
>
> "(4) Parents may choose citizenship of the Czech Republic for children under 15 years of age also separately. They do so by consonant declaration ..."[215]

In order to be entitled to the above right, however, each parent should have been a permanent resident of the territory of the Czech Republic for at least two years. On the other hand, permanent residents who did not acquire Czech citizenship had the right to maintain their residence.

(21) The Law on the Citizenship of the Slovak Republic also contained provisions on option for the nationality of the Slovak Republic (article 3), which was open, without any further requirement, to all individuals who were on 31 December 1992 citizens of the former Czechoslovakia and did not acquire the citizenship of Slovakia ipso facto. According to article 4, paragraph 1, if parents became citizens of the Slovak Republic ipso facto or by optional declaration on the basis of article 3, "the minor children automatically acquire[d] citizenship with their parents; if only one of the parents [was] alive, the child acquire[d] the citizenship with this parent."[216] According to paragraph 2 of the same article, if only one of the parents had the citizenship of the Slovak Republic, they could, however, elect that nationality for their minor children, but the joint declaration of both parents was required.

---

[214] Ibid., pp. 447-448.

[215] See the materials submitted by the Czech Republic.

[216] See the materials submitted by Slovakia.

(22) The principle of family unity was also highlighted, albeit in a rather different context, in the comment to article 19 of the 1929 Harvard Draft Convention on Nationality, where it was stated that "[i]t is desirable in some measure that members of a family should have the same nationality, and the principle of family unity is regarded in many countries as a sufficient basis for the application of this simple solution".[217]

(23) The main deficiency of numerous provisions in treaties or national legislation envisaging the simultaneous change of nationality of all the members of a family following the change of the nationality of the head of the family was the fact that they were placing the woman in a position of subordination. In an attempt to overcome this problem, article 4 of the resolution adopted by the Institute of International Law on 29 September 1896 stipulated that:

> "Unless the contrary has been expressly reserved at the time of naturalization, the change of nationality of the father of a family carries with it that of his wife, if not separated from her, and of his minor children, saving the right of the wife to recover her former nationality by a simple declaration, and saving also the right of option of the children for their former nationality, either in the year following their majority, or beginning with their emancipation, with the consent of their legal assistant."[218]

(24) While paragraph 4 of article 6 of the Draft European Convention on Nationality embodies the general requirement for each State party to facilitate in its internal law the acquisition of its nationality for, among others, spouses of its nationals and children of at least one of its nationals, chapter VI devoted to cases of succession of States does not contain any specific provision dealing with the fate of the family in such situations. Article 18 of that chapter, when referring to the general principles applicable also in the case of a succession of States, mentions those principles enumerated in articles 4 and 5[219] but does not refer to article 6. This may simply be an

---

[217] Comments to the 1929 Harvard Draft Convention on Nationality, op. cit., p. 69.

[218] Cited in ibid., p. 75.

[219] Article 4 reads:

> "The rules on nationality of each State Party shall be based on the following principles:
>
> (a) everyone has the right to a nationality;
>
> (b) statelessness shall be avoided;
>
> (c) no one shall be arbitrarily deprived of his or her nationality;
>
> (d) neither marriage nor the dissolution of a marriage between a national of a State Party and an alien, nor the change of nationality by

/...

omission. Once the Convention becomes applicable to the "State concerned", article 6 will be binding on it anyhow.

(25) The Venice Declaration does not contain any provision concerning the preservation of a family's unity in the event of a succession of States.

(26) As indicated in its 1996 Report, the Commission's Working Group felt that one of the basic principles to be observed by "States concerned" was the obligation to adopt all reasonable measures to enable a family to remain together or to be reunited, whenever the application of their internal law or of treaty provisions would infringe on the unity of such family.[220]

(27) In the Sixth Committee, the view was expressed that measures should be taken to ensure that members of a family would have the same nationality.[221]

(28) The obligation set out in article 9 is of a very general nature. It does not necessarily imply the obligation of States concerned to enable all members of a family to acquire the same nationality. Not to impair the unity of a family means to make it possible for the families of persons concerned to live together. Whenever a family faces difficulties in living together as a unit as a result of provisions of nationality laws relating to the succession of States, States concerned are deemed to be under an obligation to eliminate such legislative obstacles. The words "reasonable measures" are intended to exclude unjustified demands.

Article 10

Right of residence

> 1. Each State concerned shall take all necessary measures to ensure that the right of residence in its territory of persons concerned who, because of events connected with the succession of States, were forced

---

one of the spouses during marriage, shall automatically affect the nationality of the other spouse."

Article 5 reads:

"The rules of a State Party on nationality shall not contain distinctions which amount to discrimination on the grounds of sex, religion, race, colour or national or ethnic origin.

"Each State Party shall be guided by the principle of non-discrimination between its nationals, whether they are nationals by birth or have acquired its nationality subsequently."

[220] Official Records of the General Assembly, Fifty-first session, Supplement No. 10 (A/51/10), para. 86 (j).

[221] A/C.6/51/SR.39, para. 17.

to leave their habitual residence on the territory of such State, is not affected as a result of such absence. That State shall take all necessary measures to allow such persons to return to their habitual residence.

2. Without prejudice to the provisions of paragraph 3, the successor State shall preserve the right of residence in its territory of all persons concerned who, prior to the date of the succession of States, were habitually resident in the territory which became the territory of the successor State and who have not acquired its nationality.

3. Where the law of a State concerned attaches to the voluntary loss of its nationality or to the renunciation of the entitlement to acquire its nationality by persons acquiring or retaining the nationality of another State concerned the obligation that such persons transfer their residence out of its territory, a reasonable time limit for compliance with that obligation shall be granted.

Commentary

(1) The right of residence is one of the central issues that arise in relation to State succession. It deserves special attention in several respects. Firstly, the place of habitual residence has often been a determining factor in the resolution of problems of nationality. Secondly, voluntary changes in nationality have often had direct consequences on the right of residence of persons concerned. Numerous examples of provisions determining the nationality of persons concerned according to the place of their habitual residence are quoted in the commentaries to the draft articles in part II below.

(2) Concerning the second aspect, treaties between States concerned or national legislation have quite often provided that persons concerned were under the obligation to transfer their residence out of the territory of the State concerned whose nationality they had voluntarily renounced.

(3) Thus, article 37 of the Peace Treaty of Versailles, providing for the right of Germans habitually resident in the territories ceded to Belgium to opt for German nationality, stipulated that:

> "Persons who have exercised the above right to opt must, within the ensuing twelve months, transfer their place of residence to Germany.
>
> "They will be entitled to retain their immovable property in the territories acquired by Belgium. They may carry with them their movable property of every description. No export or import duties may be imposed upon them in connection with the removal of such property."[222]

---

[222] Materials on succession of States, op. cit., p. 20.

(4) Similar provisions were contained in article 85 of the same Treaty, concerning the right of option for Germans habitually resident in the territories ceded to the Czecho-Slovak State or in any other territories forming part of that State as well as for Czecho-Slovaks who were German nationals and were habitually resident in Germany;[223] in article 91, providing for the right of option for German nationals habitually resident in territories recognized as forming part of Poland and for Poles who were German nationals habitually resident in Germany or in a third country;[224] in article 106, relating to the Free City of Danzig concerning the right of German nationals ordinarily resident in the territory concerned to opt for German nationality;[225] and in article 113, concerning the right of persons to opt for German or Danish nationality, in relation to the restoration of Denmark's sovereignty over the territory of Schleswig subjected to the plebiscite.[226]

(5) With respect to Alsace-Lorraine, as already mentioned, paragraph 2 of the annex relating to article 79 of the Treaty of Versailles provided that certain categories of persons were entitled to claim French nationality.[227] However, that provision did not envisage a transfer of residence for persons who retained German nationality (they did not retain it voluntarily; only restoration to French nationality under that provision was voluntary). The issue was addressed in article 53 of the Treaty, which required Germany, inter alia, to recognize and accept the regulations laid down in the annex regarding the nationality of the inhabitants or natives of the said territories, not to claim at any time or in any place whatsoever as German nationals those who had been declared on any ground to be French and to receive all others in its territory.[228]

(6) The Peace Treaty of Saint-Germain-en-Laye contained provisions on the transfer of the place of residence by persons who had exercised the right of option under the Treaty similar to the above-mentioned provisions of the Treaty of Versailles.[229]

(7) Under the treaties concluded with a number of successor States after the First World War, an option for the nationality of a State other than the State of habitual residence carried the obligation to transfer one's residence accordingly. Such provisions were contained in respective article 3 of the

---

[223] Ibid., pp. 28-29.

[224] Ibid., p. 30.

[225] Ibid., p. 489.

[226] Ibid., p. 32.

Treaty of Versailles with Poland,[230] the Treaty of Saint-Germain-en-Laye with Czechoslovakia,[231] the Treaty of Saint-Germain-en-Laye with the Serb-Croat-Slovene State[232] and the Treaty of Paris with Romania.[233]

(8) This type of provision on the consequence of the exercise of the right of option is also found in articles 40 and 45 of the Peace Treaty of Neuilly-sur-Seine.[234]

(9) A different policy, however, was adopted in the case of the cession by Russia to Finland of the area of Petsamo. The Peace Treaty of Tartu of 11 December 1920, which granted the inhabitants of that territory the right of option, provided in its article 9 that:

> "All persons who opt in favour of Russia shall be free, within a time limit of one year reckoned from the date of option, to leave the territory, taking with them their movable property, free of customs and export duties. Such persons shall retain full rights over immovable property left by them in the territory of Petsamo (Petchenga)."[235]

(10) However, the Treaty of Lausanne of 1923 also provided that individuals who opted for Turkish nationality were to leave Cyprus within 12 months of exercising the right of option.[236]

(11) Article 19 of the Treaty of Peace between the Allied and Associated Powers and Italy of 10 February 1947, which envisaged that persons domiciled in territory transferred by Italy to other States and whose customary language was Italian would have a right of option, provided that:

> "... The State to which the territory is transferred may require those who take advantage of the option to move to Italy within a year from the date when the option was exercised."[237]

---

[230] G. F. de Martens, Nouveau recueil général de traités, third series, vol. XIII, p. 505.

[231] Ibid., p. 514.

[232] Ibid., p. 524.

[233] Ibid., p. 531.

[234] Materials on succession of States, op. cit., pp. 38-39.

[235] See the materials submitted by Finland.

(12) Other treaties, such as the Treaty of Cession of the Territory of the Free Town of Chandernagore between India and France, of 2 February 1951, the Agreement between India and France for the Settlement of the Question of the Future of the French Establishments in India, signed at New Delhi on 21 October 1954, and the Treaty of Cession of the French Establishments of Pondicherry, Karikal, Mahe and Yanam, between India and France, signed at New Delhi on 28 May 1956, which guaranteed the right of option,[238] did not contain any provisions on the transfer of residence.

(13) In recent cases of State succession in Eastern and Central Europe, national legislations did not require persons concerned who voluntarily acquired the nationality of another successor State to transfer their residence, although the legislation of some States provided that those persons would automatically lose the nationality of the State of their former residence.

(14) Arbitror Kaeckenbeeck held in the case of the Acquisition of Polish nationality, that the successor State normally had the right "established in international practice, and expressly recognized by the best authors" to require the emigration of such persons as had opted against the nationality of the successor State; accordingly Poland was entitled to order those inhabitants of Upper Silesia who had opted for German nationality to leave at the end of a specific period.[239] Similarly, it has been stated more recently that, "failing a stipulation expressly forbidding it, the acquiring State may expel those inhabitants who have made use of the option and retained their old citizenship, since otherwise the whole population of the ceded territory might actually consist of aliens."[240] The same logic imposes itself even more in cases of State succession other than those of transfer of part of the territory, where a right of option was granted by the successor State.

(15) The Draft European Convention of Nationality stipulates in this respect that:

> "... nationals of a predecessor State habitually resident in the territory over which sovereignty is transferred to a successor State and who have not acquired its nationality shall have the right to remain in that State."[241]

(16) Similarly, article 16 of the Venice Declaration reads:

> "The exercise of the right to choose the nationality of the predecessor State, or of one of the successor States, shall have no

---

[238] See paragraphs (24) to (26) of the commentary to draft articles 7 and 8 above.

[239] United Nations, Reports of International Arbitral Awards, vol. I, p. 427.

> prejudicial consequences for those making that choice, in particular with regard to their right to residence in the successor State and their movable or immovable property located therein."

(17) The experts of the Council of Europe, when considering the question as to which extent a successor State has the obligation to grant its citizenship to persons concerned who have their habitual residence in its territory at the moment of the succession, expressed the view that "[this] State has at least the international obligation to grant permanent residence to [such] persons [and] that in such cases making the residence permit dependent on other criteria, such as for instance a clean criminal record, is, except for cases where important interests of the State are concerned, contrary to international standards with regard to State succession".[242]

(18) Paragraph 1 of draft article 10 addresses the problem which arises when the succession of States occurs in a violent way and a large part of the population is on the move. The purpose of this provision is to preserve the right of residence of such persons. Since habitual residence often serves as a basic criterion for the determination of the nationality of the persons concerned, this provision has a direct impact on the topic currently under consideration.

(19) Paragraphs 2 and 3 address the problem of the possible consequences of the change of nationality of persons concerned on their right of residence in the territory of a State concerned other than the State of their nationality. Paragraph 2 deals with the situation where a person concerned acquires a nationality other than that of the State of his or her habitual residence ipso facto, merely by virtue of a treaty or the legislation of the States concerned. In such case, there is a strong argument in favour of protecting the right of that person to maintain his or her habitual residence.

(20) Paragraph 3 covers the situation where the change of nationality results from a voluntary act of the person concerned (option or application). Despite some recent cases mentioned above, the Special Rapporteur hesitates to introduce a rule comparable to that of the Draft European Convention on Nationality, which is not yet confirmed by sufficient State practice. He prefers instead to deal with the practical problem arising from the application of the policy sanctioned by a number of treaties which requires the persons who voluntarily acquired the nationality of another State concerned to transfer their permanent residence to such State.

(21) In such instances, the rights of the persons concerned are to be protected in two respects. First, their right to maintain their residence is to be protected, unless they might have been aware, from the legislation in force at the time of the option, that the law of the State of their habitual residence attached to the voluntary loss of its nationality or to the renunciation of the entitlement to acquire its nationality by persons acquiring or retaining the nationality of another State concerned the obligation for such persons to

---

transfer their residence out of its territory. In the latter case, paragraph 3 sets out yet another guarantee of fair treatment: the requirement of a reasonable time limit for compliance with the obligation to transfer one's residence out of the territory of the State concerned.

(22) The formulation of two different rules, one for voluntary and the other for involuntary loss of nationality or the entitlement thereto, constitutes the major difference between the present draft article and article 20, paragraph 1 (a), of the Draft European Convention.

Article 11

Guarantees of the human rights of persons concerned

> Each State concerned shall take all necessary measures to ensure that the human rights and fundamental freedoms of persons concerned who, after the date of the succession of States, have their habitual residence in its territory, are not adversely affected as a result of the succession of States irrespective of whether they have the nationality of that State.

Commentary

(1) The obligation of successor States to ensure respect for the basic human rights of all their inhabitants, both nationals and aliens without distinction, has been included in a number of multilateral treaties. Thus, article 2 of the Treaty of Saint-Germain-en-Laye with Czechoslovakia provided that:

> "Czecho-Slovakia undertakes to assure full and complete protection of life and liberty to all inhabitants of Czecho-Slovakia without distinction of birth, nationality, language, race or religion.
>
> "All inhabitants of Czecho-Slovakia shall be entitled to the free exercise, whether public or private, of any creed, religion or belief, whose practices are not inconsistent with public order or public morals."[243]

---

[243] G. F. de Martens, Nouveau recueil général de traités, third series, vol. XIII, p. 514. For English text, see M. O. Hudson, ed., International Legislation: A Collection of the Texts of Multipartite International

Similar provisions are contained in respective article 2 of the Treaty of Saint-Germain-en-Laye with the Serb-Croat-Slovene State,[244] the Treaty of Paris with Romania[245] and the Treaty of Versailles with Poland.[246]

(2) In relation to an analogous provision in article 2 of the Polish Minorities Treaty signed at Versailles on 28 June 1919, the Permanent Court of International Justice, in its advisory opinion on the question of Acquisition of Polish Nationality,[247] characterized as belonging to a "minority" those "inhabitants" of a given territory who differed from the rest of the population in race, language or religion, whether they were Polish nationals or not, and to whom (among other groups enumerated in article 2) the Polish Government had undertaken to assure certain rights.

(3) State practice indicates that, in certain cases, persons concerned who were habitually resident in the territory of the successor State were entitled to exercise also certain political rights, such as the right to participate in elections, even before the determination of their nationality.[248]

(4) It is also of interest to recall the provisions of the 1954 Convention relating to the Status of Stateless Persons, concluded on the basis of a draft prepared by the Commission, which guarantees to a stateless person in his State of residence the same treatment as that accorded by the State in question to its nationals in certain areas (access to courts, intellectual property, primary education, religious freedom, public assistance), and in others, treatment not less favourable than that accorded to aliens in general (immovable property, wage-earning employment, self-employment, housing, etc.).

---

[244] Ibid., p. 524.

[245] Ibid., p. 531.

[246] Ibid., p. 505.

[247] P.C.I.J. 1923, Series B, No. 7, pp. 14-15.

[248] In some instances, a "preliminary" definition of nationals was established to that end. Thus, annex A to the "Conclusions reached in the Conversations between His Majesty's Government and the Delegation from the Executive Council of the Governor of Burma Presented by the Prime Minister to Parliament by Command of His Majesty (January 1947)" provided:

> "A Burma National is defined for the purposes of eligibility to vote and to stand as a candidate at the forthcoming elections as a British subject or the subject of an Indian State who was born in Burma and resided there for a total period of not less than eight years in the ten years immediately preceding either 1 January 1942, or 1 January 1947."

(5) The Draft European Convention on Nationality, in addition to ensuring the right of nationals of a predecessor State habitually resident in the territory over which sovereignty is transferred to a successor State who have not acquired the latter's nationality to remain in that State, further sets out the principle that such persons "shall enjoy equality of treatment with nationals of the successor State in relation to social and economic rights".[249]

(6) The principle in draft article 11 is based on the conclusions of the Working Group.[250] Its scope of application has, however, been broadened. The Special Rapporteur has shifted the focus of the article from the problem of the interim status of persons concerned (i.e., during the period before their nationality is determined) to the more general problem of respect for the human rights and fundamental freedoms of all persons concerned who, after the date of the succession of States, retained their habitual residence in the territory of the State concerned. The philosophy underlying this provision is that a change of an individual's status, i.e., his becoming an alien in the place of his habitual residence, must not adversely affect his human rights and fundamental freedoms.

(7) Contrary to the Draft European Convention, draft article 11 does not refer to any specific categories of such rights and does not address the problem of equality of treatment. In the Special Rapporteur's view, it is obvious that, once a person concerned becomes a national of a State concerned other than that of his or her habitual residence, such person enjoys in the latter those rights to which aliens are entitled but not all the rights reserved to nationals. The requirement of the respect for the human rights and fundamental freedoms of all persons does not call into question the legitimacy of this kind of distinction.

Article 12

Non-discrimination

> When withdrawing or granting their nationality, or when providing for the right of option, the States concerned shall not apply criteria based on ethnic, linguistic, religious or cultural considerations if, by so doing, they would deny the persons concerned the right to retain or acquire a nationality or would deny those persons their right of option, to which such persons would otherwise be entitled.

Commentary

(1) The examples from State practice extensively quoted in the second report as well as in the commentaries to the draft articles in part II below suggest that there is a broad spectrum of criteria used for determining the

---

[249] Article 20, para. 1.

[250] Official Records of the General Assembly, Fifty-first Session, Supplement No. 10 (A/51/10), para. 86 (h).

categories of persons to whom nationality is granted, those from whom nationality is withdrawn and those who are entitled to exercise the right of option. These criteria are often combined. Certain criteria, however, may be discriminatory.

(2) By today's standards, article 3 of the Treaty of 1867 between the United States and Russia concerning the cession of Alaska to the United States would hardly be considered non-discriminatory. The provision gave the inhabitants of the territory the right to retain their Russian allegiance and return to Russia within three years, but if they remained in the territory beyond that period, they were to be admitted to the enjoyment of all the rights, advantages and immunities of citizens of the United States "with the exception of uncivilized native tribes".[251]

(3) The concern with avoiding discriminatory treatment led to the inclusion of certain relevant provisions in several treaties adopted following the First World War, as attested by the advisory opinion of the Permanent Court of International Justice on the question of Acquisition of Polish Nationality, in which the Court stated that:

> "One of the first problems which presented itself in connection with the protection of minorities was that of preventing these [new States, ... which, as a result of the war, have had their territory considerably enlarged, and whose population was not therefore clearly defined from the standpoint of political allegiance] from refusing their nationality, on racial, religious or linguistic grounds, to certain categories of persons, in spite of the link which effectively attached them to the territory allocated to one or other of these States."[252]

(4) The problem of discrimination in matters of nationality was also addressed in article 9 of the 1961 Convention on Reduction of Statelessness, which prohibits the deprivation of nationality on racial, ethnic, religious or political grounds.

(5) The view that "[a] State may become the subject of criticism at the international level if it does not grant nationality in accordance with criteria which are normally accepted by the international community or makes use of criteria which may be seen as arbitrary or discriminatory"[253] has, however, been expressed also quite recently.

(6) Indeed, some problems have lately arisen with respect to certain conditions set out in several new legislations concerning the acquisition of the

---

[251] The "uncivilized" tribes were to be subject to special laws and regulations. See Comments to the 1929 Harvard Draft Convention on Nationality, op. cit., p. 66.

[252] P.C.I.J. 1923, Series B, No. 7, p. 15.

[253] Report of the Experts of the Council of Europe on the Citizenship Laws, op. cit., para. 145.

nationality of the successor States by persons belonging to the initial body of that State's population. Thus, e.g., the requirement of a clean criminal record has been widely discussed. The experts of the Council of Europe stated in this connection that, "[while a] clean criminal record requirement in the context of naturalization is a usual and normal condition and compatible with European standards in this area, ... the problem is different in the context of State succession [where] it is doubtful whether ... under international law citizens that have lived for decades on the territory, perhaps [were] even born there, can be excluded from citizenship just because they have a criminal record ..."[254] A similar view has been expressed by UNHCR experts, according to whom "[t]he placement of this condition upon granting of citizenship in the context of State succession is not justified [and] would appear discriminatory vis-à-vis a sector of the population which has a genuine and effective link with the [successor State]."[255]

(7) The Draft European Convention on Nationality also contains a general prohibition of discrimination in matters of nationality. According to its article 5, the rules on nationality of each State Party shall not contain distinctions amounting to discrimination on the grounds of sex, religion, race, colour or national or ethnic origin. Article 18 of the Draft Convention makes this provision applicable also in situations of State succession.

(8) During the Commission's debate on the first report, emphasis was placed upon the obligation of non-discrimination which international law imposes on all States and which is also applicable to nationality, including in the case of a succession of States.[256]

(9) The Working Group, for its part, agreed that, while withdrawal of, or refusal to grant a specific nationality in cases of State succession should not

---

[254] Ibid., paras. 73 and 76.

[255] The Czech and Slovak Citizenship Laws and the Problem of Statelessness, op. cit., para. 76.

[256] See the statement by Mr. Crawford (A/CN.4/SR.2388). Similarly, it has recently been stressed by one author that:

> "In cases of State succession, the habitual or permanent residents of a territory constitute an as yet undifferentiated body in terms of legal link, as a result of which any grounds for distinguishing among them in the conferral of citizenship must be held to the highest standards of international human rights regulation. The term 'regulation' is, obviously, not to be interpreted as meaning only human rights treaties, to which the successors might not all be a party, but as including norms of customary law, among which the principle of non-discrimination figures prominently."

Jelena Pejic, "Citizenship and Statelessness in the Former Yugoslavia: The Legal Framework", Conference on Citizenship and Nationality in the New Europe, London, 9-10 June 1995, p. 7.

rest on ethnic, linguistic, religious, cultural or other criteria, a successor State should be allowed to take such criteria into consideration, in addition to criteria envisaged by the Working Group in paragraphs 12 to 21 of its report, for enlarging the circle of individuals entitled to acquire its nationality.[257]

(10) This position, however, was opposed by a member of the Commission who observed that authorizing a successor State to take into consideration ethnic, linguistic, religious or other similar criteria for the purpose of allowing more categories of individuals to acquire its nationality might lead to improper use of those criteria and open the way to discrimination.[258]

(11) The risk that the Working Group's conclusions on the possibility of enlarging the circle of individuals entitled to acquire the nationality of the successor State based on certain additional criteria might eventually open the way to discrimination merits further study. In support of the Working Group's conclusions, however, reference may be made to the jurisprudence of the Inter-American Court of Human Rights which, in the case concerning Amendments to the naturalization provisions of the Constitution of Costa Rica,[259] concluded that it was basically within the sovereignty of a State to give preferential treatment to aliens who, viewed objectively, would more easily and more rapidly assimilate within the national community and identify more readily with the traditional beliefs, values and institutions of that country, and accordingly held that preferential treatment in the acquisition of Costa Rican nationality through naturalization, which favoured Central Americans, Ibero-Americans and Spaniards over other aliens, did not constitute discrimination contrary to the Inter-American Convention on Human Rights.[260]

(12) The fact that resort to some of the above criteria may not necessarily lead to discrimination was also underlined by one representative in the Sixth Committee who, referring to the practice of his own country, expressed the view that the successor State had the duty to grant a right of option for the nationality of the predecessor State - he presumably envisaged the "opting out" model - only to persons having ethnic, linguistic or religious ties to the latter.[261]

(13) In general, however, the representatives in the Sixth Committee who touched upon this problem expressed their agreement with the Working Group's preliminary conclusion that States had the duty to refrain from applying

---

[257] Official Records of the General Assembly, Fiftieth Session, Supplement No. 10 (A/50/10), para. 197.

[258] Ibid., para. 219.

[259] Advisory opinion of 19 January 1984, ILR, vol. 79, p. 283.

[260] See also Chan, op. cit., p. 6.

[261] A/CN.4/472/Add.1, para. 23.

/...

discriminatory criteria, such as ethnicity, religion or language, in the granting or revoking of nationality in the context of State succession.[262]

(14) There was also the view in the Sixth Committee that the Commission should study the relationship between the requirement of genuine link and the principle of non-discrimination.[263]

(15) Draft article 12 builds on the elements on which there seems to exist consensus. Accordingly, it sets out the obligation for States concerned, when withdrawing or granting their nationality or when providing for the right of option, in relation to a succession of States, not to apply criteria based on ethnic, linguistic, religious or cultural considerations if, by so doing, they would deny the persons concerned the right to retain or acquire a nationality or their right of option, to which such persons would otherwise be entitled. The Special Rapporteur decided not to address, at the current stage, the question whether there is a need for an explicit provision stipulating that this article is without prejudice to the application by a State concerned of some of the above-mentioned criteria when this would result in enlarging the category of persons entitled to retain or acquire the nationality of that State.

Article 13

Prohibition of arbitrary decisions concerning nationality issues

1. No persons shall be arbitrarily deprived of the nationality of the predecessor State or denied the right to acquire the nationality of the successor State, which they were entitled to retain or acquire in relation to the succession of States in accordance with the provisions of any law or treaty applicable to them.

2. Persons concerned shall not be arbitrarily deprived of their right of option to which they might be entitled in accordance with such provisions.

Commentary

(1) The prohibition of arbitrary deprivation of nationality was first included in article 15, paragraph 2, of the Universal Declaration of Human Rights, which provides that:

> "No one shall be arbitrarily deprived of his nationality nor denied the right to change his nationality."

---

[262] Ibid., para. 24.

[263] Ibid., para. 8.

(2) This principle has been reaffirmed in a number of other instruments, such as article 8 of the 1989 Convention on the Rights of the Child.[264]

(3) The Draft European Convention on Nationality lists among the principles on which the rules on nationality of the States parties are to be based the principle that "no one shall be arbitrarily deprived of his or her nationality".[265]

(4) The Working Group considered that the prohibition of arbitrary decisions concerning the acquisition and withdrawal of nationality or the exercise of the right of option should be included among the general principles applicable in all cases of State succession.[266] This conclusion was supported in the Sixth Committee.[267]

(5) Draft article 13 is based on article 15, paragraph 2, of the Universal Declaration of Human Rights and contains two elements: the prohibition of arbitrary deprivation of the person's actual nationality and the prohibition of the arbitrary denial of the right of such a person to change his or her nationality. The language of the article is adapted to the context of a succession of States.

(6) Leaving aside the problem of the loss of the nationality of the predecessor State as a consequence of the disappearance of that State in cases of unification and dissolution of States, draft article 13 sets out the rule arbitrarily prohibiting deprivation of the nationality of the predecessor State in situations where that State continues to exist. It deals only with the arbitrary withdrawal of nationality from persons who were entitled to retain such nationality in relation to the succession of States. Of course, the predecessor State had the general obligation not to deprive any person arbitrarily of its nationality even before the succession of States and will have such obligation also after the succession.

(7) As to the successor State's obligation, it is based upon the premise that a person concerned is entitled (under a treaty or its legislation) to acquire its nationality. The prohibition, accordingly, ensures the protection of a person concerned against arbitrary denial of such right.

(8) Paragraph 2 is built on an analogy with the second element in article 15, paragraph 2, of the Universal Declaration of Human Rights which

---

[264] Article 8, paragraph 4, of the 1961 Convention on the Reduction of Statelessness prohibits the deprivation of nationality that would result in statelessness.

[265] Article 4, paragraph (c). The principles contained in that article are to be respected also in cases of State succession (article 18, paragraph 1).

[266] Official Records of the General Assembly, Fifty-first Session, Supplement No. 10 (A/51/10), para. 86 (f).

[267] See A/C.6/51/SR.41, para. 52.

prohibits arbitrary denial of a person's right to change his or her nationality. The expression of such a right in the context of a succession of States is the exercise of an option. Accordingly, paragraph 2 of draft article 13 provides that persons concerned shall not be arbitrarily deprived of their right of option to which they might be entitled in accordance with a treaty or the legislation of a State concerned.

Article 14

Procedures relating to nationality issues

> Each State concerned shall ensure that applications relating to the acquisition, retention or renunciation of nationality or to the exercise of the right of option in relation to the succession of States are processed without undue delay and that relevant decisions, including those concerning the refusal to issue a certificate of nationality, shall be issued in writing and shall be open to administrative or judicial review.

Commentary

(1) In relation to recent cases of succession of States, the UNHCR Executive Committee stressed the importance of fair and swift procedures relating to nationality issues when emphasizing that "the inability to establish one's nationality ... may result in displacement".[208]

(2) Appeals against decisions concerning nationality in relation to the succession of States have often been based on the provisions of municipal law governing review of administrative decisions in general. In some cases this encompassed judicial review; in others it did not.

(3) Procedures relating to nationality are the object of chapter IV of the Draft European Convention on Nationality. Articles 10 to 13 set out several requirements which can be summed up as follows: a reasonable time limit for processing applications relating to nationality issues; the provision of reasons for decisions on these matters in writing; the availability of an administrative or judicial review of such decisions; and reasonable fees.

(4) The Working Group concluded in 1996 that the general principles to be formulated by the Commission should include the obligation for States concerned to handle applications concerning nationality in relation to a succession of States without undue delay, to issue decisions in writing and to ensure that

---

[208] Report of the Executive Committee of the Programme of the United Nations High Commissioner for Refugees on the work of its forty-sixth session, Official Records of the General Assembly, Fiftieth Session, Supplement No. 12A (A/50/12/Add.1), para. 20.

these decisions be open to administrative or judicial review.[269] Support was expressed for this conclusion in the Sixth Committee.[270]

(5) Draft article 14 is proposed in view of the importance of ensuring that the procedure followed with regard to nationality matters in cases of State succession is systematic, given its possible large-scale impact. The elements spelled out in the draft article represent the minimum requirements on which broad agreement already exists among both States and commentators.

Article 15

Obligation of States concerned to consult and negotiate

> 1. The States concerned are under the obligation to consult in order to identify any detrimental effects that may result from the succession of States with respect to the nationality of individuals and other related issues concerning their status and, as the case may be, to seek a solution of those problems through negotiations.
>
> 2. If one of the States concerned refuses to negotiate, or negotiations between the States concerned are abortive, the State concerned the internal law of which is consistent with the present draft articles is deemed to have fully complied with its international obligations relating to nationality in the event of a succession of States, subject to any treaty providing otherwise.

Commentary

(1) As to the consequences which the Commission should draw from the existence of the right to a nationality in the context of State succession, it was noted, inter alia, that such right implied a concomitant obligation of States to negotiate so that the persons concerned could acquire a nationality - an obligation the Commission should stress.[271]

(2) Consequently, the first conclusion formulated by the Working Group in its preliminary report was that States concerned should have the obligation to consult in order to determine whether State succession had any undesirable consequences with respect to nationality, and, if so, that they should have the obligation to negotiate in order to resolve such problems by agreement.[272]

---

[269] Official Records of the General Assembly, Fifty-first Session, Supplement No. 10 (A/51/10), para. 86 (g).

[270] A/C.6/51/SR.39, para. 16.

[271] See the statement by Mr. Bowett (A/CN.4/SR.2387).

[272] Official Records of the General Assembly, Fiftieth Session, Supplement No. 10 (A/50/10), annex, paras. 5-7.

(3) During the debate in the Sixth Committee, satisfaction was especially expressed with the Working Group's position that negotiations should be aimed, in particular, at the prevention of statelessness.[273] Doubts were however raised as to whether the simple obligation to negotiate was sufficient to ensure that the relevant problems would actually be resolved. It was observed in this regard that the obligation to negotiate did not entail the duty to reach an agreement or to pursue the process at length if it was evident that it could not bear fruit.[274]

(4) The Working Group did not confine itself to highlighting the obligation of States concerned to negotiate; it also formulated a number of principles to be retained as guidelines for the negotiation between States concerned. These relate to the questions of the withdrawal and granting of nationality, the right of option and the criteria applicable to the withdrawal and granting of nationality in various types of State succession, and should not be interpreted outside the specific context of the succession of States. Although not all those principles are necessarily lex lata, they should not all be regarded as principles of a merely supplementary character from which States concerned are free to derogate by mutual agreement.[275]

(5) One of the issues discussed was the legal nature of said obligation. It was pointed out that its underlying sources should have been further clarified in order for it to be apprehended in a realistic manner.[276] It was recalled that this obligation was considered to be a corollary of the right of every individual to a nationality[277] or of the obligation of States concerned to prevent statelessness.[278] It was also argued that such obligation could be based upon the general principle of the law of State succession providing for the settlement of certain questions relating to succession by agreement between States concerned, embodied in the 1983 Vienna Convention on Succession of States in respect of State Property, Archives and Debts.[279]

---

[273] A/CN.4/472/Add.1, para. 16.

[274] Ibid.

[275] Official Records of the General Assembly, Fiftieth Session, Supplement No. 10 (A/50/10), para. 221. By way of example, the Special Rapporteur mentioned the obligation to prevent statelessness and, reflecting the views of the Working Group, said that it was unacceptable to impose on States an obligation to negotiate while allowing them to leave millions of persons stateless as a result of those negotiations. (Ibid.)

[276] Ibid., para. 204.

[277] Ibid., paras. 190 and 193-194.

[278] Ibid., para. 194.

[279] Ibid., para. 193.

(6) In the Sixth Committee, some delegations expressed the view that, however desirable this obligation might be, it did not appear to be incumbent upon States concerned under positive general international law. It was argued, in particular, that such obligation could not be deduced from the general duty to negotiate for the resolution of disputes.[280]

(7) Even if the Commission finds that such obligation does not yet exist as a matter of positive law, it has to consider appropriate means to establish such obligation for the States concerned, or to further the development of this principle under general international law.

(8) The aim of paragraph 1 of draft article 15 is to provide for the obligation to consult and seek a solution, through negotiations, of a broader spectrum of problems, not only statelessness. The Working Group's suggestion to extend the scope of such negotiations to such questions as dual nationality, the separation of families, military obligations, pensions and other social security benefits, and the right of residence, has generally met with the approval of the members of the Commission. Concrete examples of arrangements regarding the resolution of such problems in past cases of State succession were, moreover, provided during the discussion.[281] Relevant agreements are also to be found in recent practice.[282]

(9) However, the view has also been expressed that the above-mentioned issues have no direct bearing on legal provisions regarding nationality and should not therefore be among the issues which States are supposed to negotiate between themselves.[283]

---

[280] A/CN.4/472/Add.1, para. 16.

[281] See the statement by Mr. Kusuma-Atmadja (A/CN.4/SR.2411).

[282] Thus, the Czech Republic and Slovakia, for example, concluded several agreements resolving these issues, such as the Treaty on interim entitlement of natural and legal persons to profit-related activities on the territory of the other Republic, the Treaty on mutual employment of nationals, the Treaty on the transfer of rights and obligations from labour contracts of persons employed in organs and institutions of the Czech and Slovak Federal Republic, the Treaty on the transfer of rights and obligations of policemen serving in the Federal Police and members of armed forces of the Ministry of the Interior, the Treaty on social security and the administrative arrangement to that Treaty, the Treaty on public health services, the Treaty on personal documents, travel documents, drivers' licences and car registrations, the Treaty on the recognition of documents attesting education and academic titles, the Agreement on the protection of investment and a number of other agreements concerning financial issues, questions of taxation, mutual legal assistance, cooperation in administrative matters, etc.

[283] Official Records of the General Assembly, Fiftieth Session, Supplement No. 10 (A/50/10), para. 208.

(10) Paragraph 1 sets out the principle in the most general terms, without indicating the precise scope of the questions which are to be the subject of consultations and negotiations between States concerned.

(11) Paragraph 2 addresses the problem which arises when one of the States concerned refuses to negotiate, or when negotiations between States concerned are abortive. In this case, paragraph 2 stipulates that the State concerned the internal law of which is consistent with the present draft articles is deemed to have fully complied with its international obligations relating to nationality in the event of a succession of States. The aim of the provision is to indicate that even in such situations there are certain obligations incumbent upon States and that the refusal of one party concerned to consult and negotiate does not entail complete freedom of action for the other party.

(12) Paragraph 2 is not intended to imply that all provisions of the present draft articles have the character of strict legal obligations for States concerned. But it suggests that, unless the State concerned is bound by additional obligations under an international treaty, there are no further obligations under general international law aside from those which are included in the present draft articles.

Article 16

Other States

> 1. Without prejudice to any treaty obligation, where persons having no genuine link with a State concerned have been granted that State's nationality following the succession of States, other States do not have the obligation to treat those persons as if they were nationals of the said State, unless this would result in treating those persons as if they were de facto stateless.
>
> 2. Where persons who would otherwise be entitled to acquire or to retain the nationality of a State concerned become stateless as a result of the succession of States owing to the disregard by that State of the present draft articles, other States are not precluded from treating such persons as if they were nationals of the said State if such treatment is in the interest of those persons.

Commentary

(1) One of the functions of international law in respect of nationality is to delimit the competence of States in this field. In situations of State succession, this means the delimitation of the competence of the predecessor State to retain certain persons as its nationals and the competence of the successor State to grant its nationality to certain persons. Thus international law permits a certain degree of control over unreasonable attributions by States of their nationality.

(2) This is achieved by depriving an abusive exercise by a State of its legislative competence with respect to nationality of much of its international effect, or in other words, by eliminating its consequences as regards third States. For it is generally accepted that "the determination by each State of the grant of its own nationality is not necessarily to be accepted internationally without question".[284]

(3) Special doctrinal attention is devoted to the principle of effective nationality.[285] For Charles Rousseau, the theory of effective nationality is "a specific aspect of the more general theory of effective legal status in international law".[286]

(4) The theory of effective nationality is intended to "draw a distinction between a nationality link that is *to be enforceable* vis-à-vis other sovereign States and one that is not, notwithstanding its validity within the sphere of jurisdiction of the State concerned".[287] It is generally recognized, however, that the unilateral act of a sovereign State, such as the grant of nationality not based on a genuine link, can be considered as "null and void without requiring a prior declaration of nullity or illegality".[288]

(5) This was already recognized in article 1 of The Hague Convention of 1930 on Certain Questions relating to the Conflict of Nationality Laws, which provides that, while it is for each State to determine under its own law who are its nationals, such law shall be recognized by other States only insofar as it is consistent with international conventions, international custom and the principles of law generally recognized with regard to nationality.[289]

(6) It is widely accepted that, as in the case of naturalization in general:

> "There must be a sufficient link between the successor State and the persons it claims as its nationals in virtue of the succession, and the sufficiency of the link might be tested if the successor State attempted to exercise a jurisdiction over those persons in circumstances disapproved of by international law, or attempted to represent them diplomatically;

---

[284] *Oppenheim's International Law*, op. cit., p. 853.

[285] See Brownlie (1990), op. cit., p. 397 et seq.; H. F. van Panhuys, *The Role of Nationality in International Law*, Leyden, Sijthoff, 1959, p. 73 et seq.; Paul Weis, *Nationality and Statelessness in International Law*, second edition, Germantown, Maryland, Sijthoff-Noordhoff, 1979, p. 197 et seq.; de Burlet, op. cit., p. 323 et seq.

[286] Rousseau, op. cit., p. 112.

[287] Rezek, op. cit.

[288] Ibid., p. 365.

[289] See note 50 above.

/...

> provided, that is, there is some State competent to protest on behalf of the persons concerned."[290]

(7) Such a link may have special characteristics in cases of State succession. No doubt, as one author says:

> "Territory, both socially and legally, is not to be regarded as an empty plot: territory (with obvious geographical exceptions) connotes population, ethnic groupings, loyalty patterns, national aspirations, a part of humanity or, if one is tolerant of the metaphor, an organism. To regard a population, in the normal case, as related to particular areas of territory is not to revert to forms of feudalism but to recognize a human and political reality, which underlies modern territorial settlements."[291]

(8) A number of writers on the topic of State succession who hold the view that the successor State may be limited in its discretion to extend its nationality to persons who lack a genuine link with the territory concerned base their argument on the decision of the International Court of Justice in the Nottebohm case, in which the Court stated that "a State cannot claim that the rules [pertaining to the acquisition of its nationality that it has laid down] are entitled to recognition by another State unless it has acted in conformity with this general aim of making the legal bond of nationality accord with the individual's genuine connection with the State which assumes the defence of its citizens by means of protection as against other States".[292]

(9) In its judgment, the Court indicated some elements on which the genuine connection between the person concerned and the States whose nationality is involved can be based. As the Court said:

> "Different factors are [to be] taken into consideration, and their importance will vary from one case to the next: the habitual residence of the individual concerned is an important factor, but there are other factors such as the centre of his interests, his family ties, his participation in public life, attachment shown by him for a given country and inculcated in his children, etc."[293]

---

[290] O'Connell (1967), op. cit., p. 499.

[291] Brownlie (1990), op.cit., p. 664.

[292] I.C.J. Reports, 1955, p. 23.

[293] Ibid., p. 22. The Court's judgment admittedly elicited some criticism. It has been argued, in particular, that the Court had transferred the requirement of an effective connection from the context of dual nationality to a situation involving only one nationality and that a person who had only one nationality should not be regarded as disentitled to rely on it against another State because he or she had no effective link with the State of nationality but only with a third State. The point has also been made that the Court did not, in its judgment, adequately consider the implications of its adoption of the theory of "genuine link" in matters of diplomatic protection, which raised the

/...

(10) In practice, different tests for determining the competence of the successor State to impose its nationality on certain persons have been considered or applied, such as domicile, residence or birth. Thus, e.g., the Peace Treaties after the First World War as well as other instruments used as a basic criterion that of habitual residence.

(11) But, as has often been pointed out:

> "Although habitual residence is the most satisfactory test for determining the competence of the successor State to impress its nationality on specified persons, it cannot be stated with assurance to be the only test admitted in international law."[294]

(12) For instance, in recent dissolutions of States in Eastern Europe, the main accent was often put on the "citizenship" of the component units of the federal State which had disintegrated, which existed in parallel to federal nationality.

(13) Some authors have favoured the test of birth in the territory concerned as proof of a "genuine link", on the basis of which the successor State would be entitled to impose its nationality on those inhabitants of the territory born in it. This, however, is not broadly accepted. Nevertheless, in the case of Romana v. Comma, in 1925, the Egyptian Mixed Court of Appeal relied on this doctrine when it held that a person born in Rome and resident in Egypt became, as a result of the annexation of Rome in 1870, an Italian national.[295]

(14) The need for the existence of certain links between an individual and a State as a basis for conferring nationality was emphasized by various members of the Commission during the debates on the elimination and reduction of statelessness.[296] The discussions envisaged the application of the genuine link principle for purposes of naturalization, shedding almost no light on the question of its role in the specific context of State succession.

(15) Thus, the question arises whether the application of the genuine link concept in the event of State succession presents any particularities in comparison with its application to traditional cases of naturalization. Another question is whether the criteria for establishing a genuine link could be further clarified and developed.

---

question of the extent to which the State of which a person possessed purely formal nationality could protect him or her as against a State other than that of which he or she enjoyed effective nationality. It has also been stressed that it remained unclear whether the "genuine link" principle applied only to the acquisition of nationality by naturalization.

[294] O'Connell (1967), op. cit., p. 518.

[295] Annual Digest and Reports of Public International Law Cases, vol. 3, No. 195.

[296] See Yearbook ... 1953, vol. I, pp. 180-181, 184, 186, 218, 237 and 239.

(16) According to a view expressed during the Commission's debate on this question, outside the framework of diplomatic protection, the principle of effective nationality lost its pertinence and scope.[297] Reference was made, in this respect, to the arbitral award in the Flegenheimer case[298] and to the judgement of the Court of Justice of the European Communities in the Micheletti case.[299] However, several other members highlighted the importance of the principle of effective nationality and, in particular, the concept of a genuine link, which the Commission, in their view, should help to pinpoint better than the International Court of Justice had done in the Nottebohm case. They proposed that the criteria for establishing a genuine link for each different category of State succession should be studied.[300]

(17) In the Sixth Committee, the need to determine whether the application of the concept of genuine link presented certain specificities in the context of State succession was further highlighted.[301] This concern also appeared to be behind the comment made by one representative regarding the adoption, by successor States, of nationality laws under which they artificially extended their nationality to nationals of another independent State and which could be misused for purposes of partial or complete absorption of the population of such other State.[302]

(18) The discussion both in the Commission and in the Sixth Committee leads to the conclusion that, even if the primary context for the application of the principle of effective nationality is the law of diplomatic protection, the underlying notion of genuine link also has some role to play in the determination of the principles applicable to the withdrawal or granting of nationality in situations of State succession.

---

[297] Official Records of the General Assembly, Fiftieth Session, Supplement No. 10 (A/50/10), para. 187.

[298] The Italian-United States Conciliation Commission, in the Flegenheimer case (1958), concluded that it was not in its power to deny the effects at the international level of a nationality conferred by a State, even without the support of effectivity, except in cases of fraud, negligence or serious error. See United Nations, Reports of International Arbitral Awards, vol. XIV, p. 327.

[299] European Court Reports, case C-369/90, M. V. Micheletti et al. v. Delegación del Gobierno en Cantabria.

[300] Official Records of the General Assembly, Fiftieth Session, Supplement No. 10 (A/50/10), para. 186.

[301] A/CN.4/472/Add.1, para. 8. Some authors have argued that "a successor State in whose territory an individual habitually or permanently resides, depending on the adopted classification, would presumably have much less difficulty meeting [the test of genuine link]". Pejic, op. cit., p. 3.

[302] A/CN.4/472/Add.1, para. 10.

(19) One of the preliminary conclusions of the Working Group was that a third State should not have to give effect to the decisions of the predecessor or successor State regarding, respectively, the withdrawal of, or refusal of granting of, its nationality in violation of the principles formulated by the Group.[303]

(20) The aim of paragraph 1 of draft article 16 is to ensure compliance by States concerned with the rules of international law regarding restrictions on the delimitation of their competences. The draft article does not prescribe any specific test to be used by successor States when granting their nationality to persons concerned. (This problem is addressed, in the form of a recommendation, in part II of the draft articles.) Paragraph 1 merely sets out the principle of non-opposability vis-à-vis third States of nationality granted in disregard of the requirement of genuine link.

(21) Paragraph 2 deals with another problem with which third States may be confronted in the case of a State succession. The assumption here is the unwillingness of the successor State to grant its nationality to certain persons who are normally entitled to acquire such nationality or the withdrawal by the predecessor State of its nationality from persons who are normally entitled to retain its nationality. As already discussed,[304] international law cannot correct the insufficiencies of the internal law of the States concerned, even if it results in statelessness. But does this mean that third States are simply condemned to a passive role?

(22) Paragraph 2 represents an attempt to draw some practical consequences from the idea put forward by certain members that the Commission should try to formulate some "presumptions" as to the nationality of persons concerned.[305] The Special Rapporteur, following the preliminary reaction of the Working Group on this matter,[306] proposes that, in addition to the reaffirmation of the traditional rule of non-opposability in paragraph 1, a specific provision be included concerning the rights of third States.

(23) In his view, whenever persons who would otherwise be entitled to acquire or to retain the nationality of a State concerned become stateless as a result of the succession of States because of the disregard by that State of the basic principles contained in the present draft articles, other States should not be precluded from treating such persons as if they were nationals of the

---

[303] Official Records of the General Assembly, Fiftieth session, Supplement No. 10 (A/50/10), annex, para. 29.

[304] See para. (7) of the commentary to the draft preamble above.

[305] See the statement by Mr. Crawford (A/CN.4/SR.2388). See also the discussion of the concept of nationality in the first report, A/CN.4/467, paras. 57-74.

[306] Official Records of the General Assembly, Fiftieth Session, Supplement No. 10 (A/50/10), annex, para. 29; ibid., Fifty-first Session, Supplement No. 10 (A/51/10), para. 86 (1).

said State. The intention here is to alleviate, not to further complicate, the fate of these stateless persons. Accordingly, this provision is subject to the requirement that such treatment be in the interest, and not to the detriment, of these persons. In practical terms, this means that a third State might extend to these persons a favourable treatment reserved, under a treaty, to nationals of the State in question. But, while a third State has the right to deport actual nationals of the State which has violated the present draft articles, provided that there are legitimate reasons for such action, it may not deport to such State persons referred to in paragraph 2 on the basis of the provisions of that paragraph.
